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PRIVILEGED VIOLENCE, PRINCIPLED FANTASY, AND FEMINIST METHOD: THE COLBY FRATERNITY CASE

Martha T. McCluskey*

Rui Barbosa believes in the law, and bases his belief on erudite quotations from imperial Romans and English liberals. But he doesn't believe in reality. The doctor shows a certain realism only when, at the end of the month, he collects his salary as lawyer for Light and Power, that foreign enterprise which in Brazil exercises more power than God.

—Eduardo Galeano¹

It is this unconscious restructuring of burdens of proof into burdens of white over black that permits people who say and who believe that they are not racist to condone and commit crimes of genocidal magnitude.

—Patricia J. Williams²

Talking to my wife and mother and sisters about the [Clarence Thomas] hearings, I heard in their voices not so much anger as resignation and familiarity. "This comes to you as a *surprise*?" they said, in so many words. . . . I owe them an apology. They had experienced things that I had not, and had tried to tell me truths that I had chosen not to hear.

—*The New Yorker*³

I. AN EXPERIENCE

It is 1977 at Colby College.⁴ I'm a student living on Third Floor Dana. Most of the guys on our hall are pledging Lambda Chi and KDR,⁵ rumored to be the worst fraternities on campus—and the

* Counsel, Office of the Public Advocate, State of Maine. B.A., Colby College, 1980; J.D., Yale Law School, 1988. I thank the many Colby students, faculty, and staff who have inspired me over the years with their commitment to critical, caring debate. I am particularly grateful to Kimberly A. Hokanson for generously sharing her extensive research with me, and to the many others who offered ideas, comments, and research assistance. The views expressed in this article are solely my own.

1. EDUARDO GALEANO, *MEMORY OF FIRE: III. CENTURY OF THE WIND* 21 (Cedric Belfrage, trans., 1988).

2. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 68 (1991).

3. *Talk of the Town*, *THE NEW YORKER*, Oct. 28, 1991, at 33.

4. Located in Waterville, Maine, Colby ranked 20th out of 140 selective liberal arts colleges in the 1991 *U.S. News & World Report's* "America's Best Colleges" edition. *U.S. News Top 25 National Liberal Arts Colleges*, *U.S. NEWS & WORLD REPORT*, Sept. 30, 1991, at 97.

5. Lambda Chi Alpha and Kappa Delta Rho (KDR) are the names of Greek-letter men's organizations with chapters at colleges nationwide. Members of Lambda Chi,

most prestigious.

It's the beginning of a vacation and my dorm is quiet and nearly empty. I am standing in the hallway looking out the window for my ride home. I turn around and my suitcase is gone; Joe and Bill⁶ from down the hall are laughing as they carry it away. I follow them. I hear a door lock behind me. They let go of my suitcase and grab me.

I am lying on the bare linoleum floor of Joe's bedroom. In the room are a group of Lambda Chi and KDR pledges who live on my hall; several of them are football players. Some are sitting on the bed, laughing. Two others are pinning my arms and my legs to the floor. Joe is touching me while the others cheer.

I am a friendly fellow-classmate as I reasonably explain that I'm in a rush to catch a ride; that I'm not in the mood to joke around; that I'd really like them to please cut it out. It takes a few long upside-down seconds before things look different. As I start to scream and fight I feel like I am shattering a world that will not get put back together. They let me go.

Later I don't talk about this, not even to myself. I sit near Joe and Bill in sociology and English classes. I don't talk in class.

* * *

What is most noteworthy to me about this story is that I don't remember thinking that this was a noteworthy experience. Being assaulted by otherwise normal white college men was not significant in my life then because I did not understand this as real violence.

II. A METHOD⁷

If it hurts a woman, it's a big deal.

—Catharine A. MacKinnon⁸

Feminist jurisprudence aims to change law and life by taking women seriously.⁹ Feminist method starts by believing women's accounts of our experiences, particularly our experiences of oppression.¹⁰ This feminist legal analysis is part of a growing body of legal

or LCA, were also known at Colby as "Choppers."

6. Names have been changed.

7. The term "method" has scientific connotations that may perpetuate the ideology of objectivity that feminist method seeks to unravel. See Carol Smart, *Feminist Jurisprudence*, DANGEROUS SUPPLEMENTS 133, 145 (P. Fitzpatrick ed., 1991). Nonetheless, I hope that using this term will subversively focus attention on feminism's challenge not just to the content of law, but to its epistemological foundations.

8. Catharine A. MacKinnon, *To Quash a Lie*, SMITH ALUMNAE Q., Summer 1991, 11 at 14.

9. "Feminist method starts with the very radical act of taking women seriously, believing that what we say about ourselves and our experience is important and valid . . ." Christine A. Littleton, *Feminist Jurisprudence: The Difference Method Makes*, 41 STAN. L. REV. 751, 764 (1989) (reviewing CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* (1987)).

10. "The reason, MacKinnon asserts, that feminism has been able to uncover real-

scholarship devoted to speaking stories that traditionally have been silent in most of the U.S. legal system.¹¹

It is precisely the apparent innocuousness of this feminist method—assuming women's experiences are real—that makes it so radical. To elevate this assumption to a methodology for what may be a leading approach to law¹² is to presume that the denial of women's experiences is fundamental to traditional legal theory.

The legal and societal lie that this feminist method challenges is not simply a partial truth to which women's experiences can be added to complete a vision of justice.¹³ In this feminist analysis, the problem of inequality is not merely a matter of accidental process failure in need of correction; nor is it a matter of irrational classification in need of clarification.¹⁴ Instead, this method is radical because it examines and resists the dominant process of legal construction of truth and justice.

Feminist method seriously considers that brutality and injustice can be the norm in communities full of people who believe they are well-meaning, respectable, and fair.¹⁵ The predominance of denial of

ity previously hidden from social view is 'its methodological secret, . . . that feminism is built on believing women's accounts of sexual use and abuse by men.'" *Id.*

11. See, e.g., AT THE BOUNDARIES OF LAW FEMINISM AND LEGAL THEORY, (Martha Albertson Fineman & Nancy Sweet Thomadsen eds., 1991); SUSAN ESTRICH, *REAL RAPE* (1987); Jerome McCristal Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539 (1991); Richard Delgado, *When a Story is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95 (1990); Mark Fajer, *Can Two Real Men Eat Quiche Together?: Story-Telling, Gender-Role Stereotypes, and Legal Protections for Lesbians and Gay Men*, 46 U. MIAMI L. REV. (forthcoming 1992); Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886 (1989); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Christine A. Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); Cathy Scarborough, *Conceptualizing Black Women's Employment Experiences*, 98 YALE L.J. 1457 (1989); WILLIAMS *supra* note 2.

12. "'Over the next quarter century,' Prof. Laurence H. Tribe of Harvard Law School says, 'feminist legal theory is likely to be the most fertile source of important insights in the law.'" Fred Strebeigh, *Defining Law on the Feminist Frontier*, N.Y. TIMES, Oct. 6, 1991, § 6 (Magazine), 28, 30.

13. See Carol Smart, *Law's Power, the Sexed Body, and Feminist Discourse*, 17 J. LAW & SOC'Y 194, 198-200 (1990).

14. For discussions of traditional views of inequality, see, for example, Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV L. REV. 1, 6-8 (1976); Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 353-56 (1949); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 145-70 (1980).

15. Strong reactions to *Thelma & Louise*, a recent movie version of this theme, demonstrate that this feminist method is still widely considered radical:

Hysterics were especially in evidence among male critics.

John Robinson of the *Boston Globe* called *T & L* "the last straw" of

oppression is precisely what gives this denial the appearance of reasonableness.¹⁶ The "no-problem" problem," as Deborah Rhode terms it, overwhelmingly subverts gender justice.¹⁷

Yet this feminist method must negotiate the same dangers of denial it seeks to challenge. Women have no universal, essential "experience"; accounts of "women's experience" risk neglecting the point of view of all but the most privileged white women.¹⁸ The category "women" is itself an abstraction that excludes the full reality of the complex and varying experiences of identities (or nonidentities) that intersect in any particular person.¹⁹ Women experience discrimination not "as women" in the abstract but as "women" of a particular race, age, class, sexuality, nationality, physical ability, and other identifying characteristics.²⁰ Each individual woman's accounts of

"male bashing," and "the latest in a string of cultural strikes against manhood." . . . John Leo, of *U.S. News & World Report*, labeled the film "Toxic Feminism." Ralph Novak of *People* had even more of a fit: "Any movie that went as far out of its way to trash women as this female chauvinist sow of a film does to trash men would be universally, and justifiably, condemned."

Dream on, Ralph! Negative stereotyping of women is, indeed, the accepted norm in Hollywood films

But, to be fair, the boys had a right to feel threatened by this movie

. . . .

Thelma & Louise portrayed male violence as an ordinary, everyday event.

Kathy Maio, *Film: Women Who Murder for the Man*, Ms., Nov./Dec. 1991, at 82-83.

16. See Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence* 8 SIGNS- J. WOMEN IN CULTURE & SOC'Y 635, 654 (1983).

17. Deborah L. Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731 (1991). "For feminists, a central problem remains the lack of social consensus that there is in fact a problem." *Id.* at 1734. This culture of denial is a familiar and deadly feature of systematic racism. See, e.g., ANNE FRANK FOUNDATION, ANTISEMITISM: A HISTORY PORTRAYED (Janrense Boonstra et al. eds., 1989) 112-16; TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63 508-09 (1988) (FBI report of beating of black civil rights activist failed to mention his serious injuries).

18. See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN L. REV. 581, 587-88 (1990); Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47, 47-48 (1988).

19. Judith Butler cautions against taking "the category of women to be foundational . . . without realizing that the category effects a political closure on the kinds of experiences articulable as part of feminist discourse." Judith Butler, *Gender Trouble, Feminist Theory, and Psychoanalytic Discourse*, FEMINISM/POSTMODERNISM 324, 325 (Linda J. Nicholson ed., 1990). Angela Harris argues that the concept of unified self denies the experiences of women of color. Harris, *supra* note 18, at 608.

20. Antidiscrimination law frequently enforces the incorrect white-centered view that discrimination based on sex is separate and independent from discrimination based on race. See Kimberle Crenshaw, *A Black Feminist Critique of Antidiscrimination Law and Politics*, THE POLITICS OF LAW A PROGRESSIVE CRITIQUE 195 (David Kairys ed., 2d ed. 1990); Scarborough, *supra* note 11.

her own experience are filtered through her changing cultural, political, and biological contexts. And feminist method ironically draws on the "regulatory fiction" of gender coherence which, as Judith Butler argues, is a condition of the gender oppression feminist method aims to resist.²¹

The denial of gendered oppression, then, operates in different forms and degrees against different women—and those perceived to be like women—and operates interdependently with ideologies of race, sexuality, and class. Feminist legal analysis should emphasize women's experiences not as windows to a universal or unmediated reality, but as vehicles to understanding how law credits certain experiences of reality and denies others.

Rhode contends that "[t]he law provides a crucial structure in which ideologies of denial are reflected and renegotiated."²² By institutionalizing and re-enforcing versions of reality that reflect the interests of dominant groups, and by presenting these versions of reality as not made but given, law encourages people who are firmly committed to principles of freedom and equality to "condone and commit crimes of genocidal magnitude," in Patricia Williams's words.²³ Feminist legal analysis hopes to contest not simply particular laws but also the agents and terms of legal reality-making—and to change reality. Feminist method can help demonstrate that justice requires dismantling a process of systematic denial, not simply establishing new rules or presenting new facts. And it cautions that in the face of this denial, traditional legal approaches to civil rights will bring limited success.

III. A CIVIL RIGHTS CASE

A. *The Maine Civil Rights Act*

In 1989 a group of Maine activists and attorneys concerned about hate crime drafted what became the Maine Civil Rights Act.²⁴ This new law was inspired by Klan threats directed at black residents of a public housing project and by street attacks on gay men.²⁵ The

21. Butler, *supra* note 19, at 339.

22. Rhode, *supra* note 17, at 1736.

23. WILLIAMS, *supra* note 2, at 68.

24. ME. REV. STAT. ANN. tit. 5 §§ 4681-4683 (West Supp. 1990-1991), amended by P.L. 1992, ch. 821.

25. See e.g., *The Maine Civil Rights Act: Hearing on L.D. 1253 Before the Committee on the Judiciary, 114th Legis., 1st Sess., May 12, 1989* (statement of Donald F. Fontaine, Esq.); Brief of Amicus Curiae, National Lawyers Guild Maine Chapter at 4 n.2, *Phelps v. President and Trustees of Colby College*, 595 A.2d 403 (Me. 1991). See also *Talbot Says KKK 'Scary'*, PORTLAND PRESS HERALD, Sept. 14, 1988, at 31; *Imperial Wizard Seeking to Unite Right-Wing Groups*, ME. SUNDAY TELEGRAM, Oct. 9, 1988, at 43A; *Assault Victim Asks Probe of Police*, PORTLAND PRESS HERALD, Nov. 17, 1988, at 39; *Two Fined Who Wore Klan Garb at Protest*, PORTLAND PRESS HERALD, Jan. 13, 1989, at 9; *'Skinheads' Bolster Ranks of Neo-Nazi Racist Groups*, PORT-

drafters intended the law to provide civil remedies for violations of civil rights by private persons using threat, intimidation, or coercion.²⁶

The law states:

Whenever any person, whether or not acting under color of law, intentionally interferes by threat, intimidation or coercion or attempts to intentionally interfere by threat, intimidation or coercion, with the exercise or enjoyment by any other person of rights secured by the United States Constitution or the laws of the United States or of rights secured by the Constitution of Maine or laws of the State, the Attorney General may bring a civil action for injunctive or other appropriate equitable relief in order to protect the peaceable exercise or enjoyment of the rights secured.²⁷

An additional section of the Act gives private individuals the right to bring an action in their own name if they are a person "whose exercise or enjoyment of rights secured by the United States Constitution or laws of the United States, or of rights secured by the Constitution of Maine or laws of the State of Maine, has been interfered with"²⁸

This is a typical solution to problems of injustice: improving legal rules—in this instance, by creating a remedy for hate group violence and threats. But, not atypically, the test case under this new law has been a suit on behalf of an elite men's group with a history of hate.²⁹ In 1990 the Maine Civil Liberties Union invoked the new Maine Civil Rights Act to protect the rights of male Colby College students to participate in a fraternity called Lambda Chi Alpha.³⁰

LAND PRESS HERALD, Mar. 17, 1989, at 2.

26. See *supra* note 24. The law was patterned after a similar Massachusetts law, the Massachusetts Civil Rights Act, with an additional requirement that the interference be intentional. See MASS. GEN. LAWS ANN. tit. 12, § 11H (West 1986).

27. ME REV. STAT. ANN. tit. 5, § 4681 (West Supp. 1990-1991), amended by P.L. 1992, ch. 821.

28. ME REV. STAT. ANN. tit. 5, § 4682 (West Supp. 1990-1991), amended by P.L. 1992, ch. 821.

29. Legal provisions designed to protect people of color or all women typically have been used to advance the interests of those who are white and/or male. See, e.g., *Orr v. Orr*, 440 U.S. 268 (1979); *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978); *Califano v. Webster*, 430 U.S. 313 (1977); *Craig v. Boren*, 429 U.S. 190 (1976).

30. The Maine Civil Liberties Union brought a motion for a temporary restraining order against Colby College on behalf of graduating seniors who were sanctioned by the college for associating in Lambda Chi Alpha. See Memorandum of Law in Support of Plaintiffs' Motion for Temporary Restraining Order (Cumb. Cty. Super. Ct., May 22, 1990); *Frat Action May Violate Civil Rights*, ME. TIMES, Apr. 27, 1990, at 7. After losing the TRO motion, the MCLU continued its suit for an injunction. *MCLU Claims Colby Trampled Rights of Underground Fraternity Students*, CENTRAL ME. MORNING SENTINEL, Aug. 9, 1990, at 2.

Prior to the Colby case, Maine's highest court, in the only decision involving the Maine Civil Rights Act, rejected without discussion a claim by a father against his child's guardian ad litem. The father claimed that the guardian interfered with his

B. *The Colby Fraternity Case*

Colby College banned fraternities and sororities in 1984 after many years of unsuccessfully attempting to improve fraternity behavior.³¹ Sexual harassment and sex discrimination were major reasons for the college's decision.³² At first the college withheld official recognition of and financial benefits to the fraternities.³³ Membership in fraternities was not punished, although Colby established a

rights by making a recommendation that resulted in the child's custody being given to the child's mother. *Gerber v. Peters*, 584 A.2d 605 (Me. 1990).

In contrast to Maine's experience, Massachusetts' similar Civil Rights Act has been used since 1979 to protect the civil rights of a wide range of plaintiffs. See Jennifer Wiggins, former Assistant Attorney General, Civil Rights Division, Mass. Attorney General's Office, Introduction to the Massachusetts Civil Rights Act (1989) (on file with author).

31. REPORT OF TRUSTEE COMMISSION ON CAMPUS LIFE, COLBY COLLEGE (Dec. 1983) (written by Colby Trustee Judge Levin H. Campbell, then Chief Judge of the United States Court of Appeals for the First Circuit) [hereinafter TRUSTEE REPORT]. "After a thorough appraisal of the Colby fraternity system, we recommend, sadly, but with great conviction, that Colby withdraw recognition from its fraternities and sororities." *Id.* at 3. See also, Susan Leonard, *Colby to Scrap Frats, Sororities*, CENTRAL ME MORNING SENTINEL, Jan. 16, 1984, at 1, 13 (featuring a picture of male Colby students feeding fraternity house furniture into a bonfire to protest the trustees' decision). This decision made Colby the first college in over twenty years to abolish Greek organizations. Kimberly A. Hokanson, *Underground Fraternities at Colby College*, May 11, 1989, at 21 (unpublished paper prepared as part of Ph.D. program at Harvard University Graduate School of Education).

The TRUSTEE REPORT dates fraternities at Colby from 1845, and states that at their peak "nearly 90 percent of undergraduate men belonged to nine fraternities at Colby, and received the benefits of camaraderie, independence, and competition which these institutions bestowed." TRUSTEE REPORT at 6. When the college decided to move to its present location in the 1930s, it took on the responsibility for financing and constructing new fraternity buildings at the center of campus (called "frat row")--in contrast to many colleges, where fraternities are more discreetly located off campus. See *Alpha Rho Zeta of Lambda Chi Alpha, Inc. v. City of Waterville*, 477 A.2d 1131, 1135 (Me. 1984). Through the 1970s, the college continued to spend money to bail out the frequently financially troubled, exclusively male groups. *Id.* At the time they were banned, Colby's fraternities owed the college almost half a million dollars. TRUSTEE REPORT at 6.

Although the Report in its introduction addresses its ban to both "fraternities and sororities," fraternities were clearly the concern. "Sororities at Colby have obviously not suffered from many of the problems which have affected the fraternity system." TRUSTEE REPORT at 13. Sororities never had their own houses and were never a predominant feature of campus life. See Hokanson *supra* note 31, at 2 n.6.

The college's decision to withdraw its official support of fraternities was unsuccessfully challenged on contract and constitutional grounds by Lambda Chi and other fraternities in *Chi Realty Corp. v. Colby College*, 513 A.2d 866, 868 (Me. 1986).

32. TRUSTEE REPORT, *supra* note 31, at 10; Kimberly A. Hokanson, *The Role of College Fraternities in the 1980's: A Comparative Study of Bowdoin and Colby Colleges* 8 (June 2, 1986) (unpublished paper prepared as part of Ph.D. program at Harvard University Graduate School of Education).

33. See *Colby and Fraternities: Where We Stand* (August 1990) (unpublished memorandum about the fraternity lawsuit distributed by Colby College administration).

policy prohibiting any participation in fraternities.³⁴

The college had hoped that without houses, financing, and other support from the administration, the fraternities would disband—particularly once all students who had belonged to the officially sanctioned groups had graduated.³⁵ Although the sororities soon dissolved,³⁶ most of the male Greek organizations continued and even thrived underground.³⁷ In 1990, after six years of continuing campus problems related to fraternities, the college decided to punish a group of students for belonging to Lambda Chi.³⁸

34. In 1988 the administration asked students on athletic teams and dorm staff to sign an agreement stating that they would not join fraternities. *Colby and Fraternities: Where We Stand* 6 (August 1990), *supra* note 33. The college also sent letters to new students stating that "anyone found to have engaged in perpetuating these organizations will be subject to suspension." Brief for Appellant at 8, *Phelps v. President & Trustees of Colby College*, 595 A.2d 403 (Me. 1991) (No. CV-90-287).

35. Hokanson, *supra* note 31, at 6. See also Denise Goodman, *Colby Rules, Fraternity Rights at Issue*, BOSTON SUNDAY GLOBE, Aug. 5, 1990, at 63.

36. Hokanson, *supra* note 31, at 8-9.

37. Frat parties, such as Bison Night—an all-campus party traditionally sponsored by Lambda Chi following the last football game of the season—were sponsored by "former" fraternity members. Similarly, members of Zeta Psi threw the ever-popular "Alabama Slammers" party while DU continued to sponsor parties featuring a drink called "The Green Death." . . . In April of 1986, almost two years after fraternities were banned, the student newspaper printed a full-page advertisement for an all-campus "tent party" in the new student center. The ad was framed by the initials PDT—Phi Delta Theta.

Hokanson, *supra* note 31, at 5-6.

In 1986, the college discovered a pledge test and a dues book indicating that groups were actively recruiting new members, but the college refrained from taking any disciplinary action against members. *Id.* at 7. At that time, the Dean of Students issued a statement urging students to reject fraternity membership because it was inimical to "a fully open, non-exclusionary, and non-discriminatory community." *Id.* at 8 (quoting Janice A. Seitzinger, Open letter to the Colby College community (April 16, 1986)).

At the beginning of the 1988-89 academic year, six of the former nine fraternities continued to maintain a presence at Colby. Hokanson, *supra* note 31, at 8. Almost as many students—approximately 20% of the male student body—belonged to fraternities in that year as in 1984, when fraternities were banned. *Id.* at 9.

38. COLBY CURRENTS, Summer 1990, at 5-7; *Colby and Fraternities: Where We Stand* (August 1990), *supra* note 33. In 1988-89, the college did begin to take a stronger stand against fraternities, without imposing disciplinary measures for membership. For example, the college denied official recognition to campus parties with fraternity themes, students were warned that wearing Greek-letter insignia could spark investigations of illegal activity relating to fraternities, and at least one professor denied letters of recommendation to students demonstrating fraternity involvement. Hokanson, *supra* note 31, at 10.

In 1987, five students were disciplined for stealing \$2,000 worth of linens from Waterville motels in an incident "generally understood to be fraternity activity." *Colby and Fraternities: Where We Stand* 5 (August 1990). In December 1988, six Colby students were arrested for stealing Christmas ornaments from local residents. "The students, all members of the 1988 pledge class of Zeta Psi, had been instructed by

Early that year, the college had faced increasing problems of fights, hazing, and vandalism in the dorms, reportedly caused by Lambda Chi pledging activities.³⁹ In March of 1990, the state police were called to investigate a disturbance in a grange hall.⁴⁰ They discovered a group of fifty or more male Colby students who said they were participating in a Lambda Chi initiation ritual.⁴¹ A document signed by a list of pledges described the ceremony establishing brotherhood through a process of spanking, sliding naked on beer-soaked plastic, and severing the heads of cows and chickens.⁴²

upperclass Zete brothers to supply decorations for the fraternity's Christmas party. . . . The college made a decision, as one administrator put it, to go after the 'drug dealers' rather than the 'users.'" Hokanson, *supra* note 31, at 10. In exchange for lenient punishment of the arrested students (100 hours of community service), the upperclass Zete brothers agreed to disband their group. *Id.* at 11. Also that same winter, the college responded in the same way to a similar theft by pledges of another fraternity. *Id.*

39. Colby and Fraternities: Where We Stand 6-7 (August 1990), *supra* note 33.

40. Denise Goodman, *Colby Rules, Fraternity Rights at Issue*, BOSTON SUNDAY GLOBE, Aug. 5, 1990, at 63.

41. *Id.*

42. An excerpt from the pledge document:

First, each of us began as an individual this was represented on the shield by the phrase "VIR QUISQUE VIR" meaning each man a man. . . . The first step of our journey was from being individuals to becoming pledges . . . we became Neophytes, "a newly planted seed in the enriched soil of Lambda Chi Alpha." . . . The next stage was our birth. On Father-son night there were many symbols of this. We slid out of the womb naked and pure represented through the naked-beer slides. We were also spanked by our fathers represented by the paddling, and Baptized by our Fathers when the beer was poured in our faces. The jubilant father then smoked cigars with his fellow brothers, celebrating our birth. We were removed from the darkness with the removal of our hoods, and were introduced to our lineage. We realize this was achieved only after passing three tests for breaking our bond.

Defendant's Exhibit 1, *Phelps v. President & Trustees of Colby College*, 595 A.2d 403 (Me. 1991) (No. CV-90-287). One student, a staffperson of the dormitory where a number of the Lambda Chi pledges lived, described reports of the Lambda Chi initiation: "They were required to sit in a circle, take acid, and couldn't move. Some of the pledges returned with bruises 'from running into the same threaded pipe.' Some of the pledges had blood on them and there have been various reports ranging from pledges asked to beat each other up and chickens being cut up as part of a ritual." Defendant's Exhibit 6, *Phelps v. President & Trustees of Colby College*, 595 A.2d 403 (Me. 1991) (No. CV-90-287).

The Lambda Chi rituals symbolizing birth and featuring sexual imagery, spanking, and brutality against animals are not unusual or unique to Colby. One anthropologist analyzed college fraternity initiation rituals in the U.S. as a means of training young men in male dominance. PEGGY REEVES SANDAY, *FRATERNITY GANG RAPE SEX, BROTHERHOOD, AND PRIVILEGE ON CAMPUS* (1990). Sanday finds that a central theme of many fraternity initiations is to redefine traits traditionally associated with women—such as birth—into male-controlled forms. *Id.* at 154. These rituals serve to construct a masculine identity that builds brotherhood through homophobia and misogyny. *Id.* at 155.

Under pressure from the college administration, Lambda Chi members came forward to the school and admitted that they had violated the college's rules against fraternity involvement.⁴³ A series of meetings between the Colby administration, faculty, staff, and student groups culminated in the college's decision to sanction the students for their fraternity participation.⁴⁴ The college barred the Lambda Chi seniors from marching in graduation ceremonies and suspended the underclassmen for one semester.⁴⁵

The Maine Civil Liberties Union (MCLU) decided to take up the cause of the punished fraternity members. It initiated a suit under the Maine Civil Rights Act, claiming that Colby had interfered by threat, intimidation, or coercion with the Lambda Chi members' rights to freedom of association and freedom of speech. Civil liberties lawyers joined national fraternity leaders in portraying the fraternity case as part of a dangerous new wave of intolerance sweeping

Another author describes the function of fraternities in preserving both male homosocial bonds and homophobia:

It is a striking fact that friendships in America, especially male friendships, are not as deep as in other cultures. The American male suspects that there is something sissified about a devoted and demonstrative friendship, except between a man and a woman, and then it must pass over into love, or perhaps just into sex. In their clubs and associations, however, at first in school clubs and college fraternities and later in secret lodges or women's clubs, Americans find a level of friendship that does not lay them open to the charge of being sentimental. In his clubs a man is not ashamed to call another man "brother. . . ."

Max Lerner, *The Joiners*, in *AMERICA'S VOLUNTARY SPIRIT: A BOOK OF READINGS* 82, 83 (Brian O'Connell ed., 1983).

43. Colby and Fraternities: Where We Stand (August 1990), *supra* note 33; Brief for Appellants at 11-17, *Phelps v. President & Trustees of Colby College*, 595 A.2d 903 (Me. 1991) (No. CV-90-287) (describing pressure put on Lambda Chi members to come forward to the administration).

44. See Colby and Fraternities: Where We Stand 7-9 (August 1990), *supra* note 33. "In a practice that has become common when Colby deals with controversy, Cotter launched a campus-wide dialogue, inviting the views of students, faculty members and alumni. In 10 days, he received 125 letters, many urging strong sanctions." Denise Goodman, *Colby Rules, Fraternity Rights at Issue*, *BOSTON SUNDAY GLOBE*, Aug. 5, 1990, at 63. One student letter described a dorm meeting on the issue: "The head resident made the comment that 'they obviously can't expel 63 people.' The response that she received surprised both of us and may interest you: 50 people said, spontaneously but in near-perfect unison, 'Why not?' " *'Underground' Frats Call It Quits, Ending Uneasy Six-Year Transition*, *COLBY CURRENTS*, Summer 1990, at 6.

45. Pledges were placed on disciplinary probation and required to complete 50 hours of community service. All Lambda Chi members were suspended from extra-curricular activities, including athletics, for the remainder of the spring term. As a result of appeals which successfully argued mitigating circumstances, a number of students had their sanctions reduced. Colby and Fraternities: Where We Stand 9 (August 1990), *supra* note 33. In meetings and letters to the administration before the sanctions were imposed, a number of students demanded that the fraternity members be punished by expulsion, not just suspension. *COLBY CURRENTS*, Summer 1990, at 6.

the country as colleges force "politically correct" views on students.⁴⁶

Colby College, in reply, argued that it had "the right, and indeed the duty, to determine that its educational mission is furthered by maintaining a college community that is free from fraternity activities and free from sexism, exclusivity, disruptive behavior, hazing, and other antisocial activities of the kind engaged in by Plaintiffs in this case."⁴⁷ The college described the case as a traditional college disciplinary issue, rather than a civil rights issue.⁴⁸

Colby further claimed that its constitutionally protected right to freedom of association would be violated by requiring it to enroll students belonging to fraternities.⁴⁹

C. *The Court Decisions: Phelps v. President & Trustees of Colby College*

The trial court ruled against the fraternities. Justice Donald Alexander decided that a broad civil rights law barring private interference with First Amendment rights would create a constitutional puzzle.⁵⁰ In traditional First Amendment law, protection from gov-

46. See Richard O'Meara, Esq., Oral Argument Before the Law Court in *Phelps v. President & Trustees of Colby College* (May 1, 1991) (tape recording on file with author); Brief for Plaintiffs-Appellants at 1, 16, *Phelps v. President & Trustees of Colby College*, 595 A.2d 403 (Me. 1991) (No. AND-90-511) (tape recording on file with the author). "In [Colby President William Cotter's] attempts to create the perfect Mecca for political correctness, he has essentially made it a crime punishable by expulsion to be a heterosexual male who chooses to formalize his friendship with other like-minded friends away from campus . . ." Gregory E. McElroy, national executive director of the Zeta Psi Fraternity, quoted in *Colby Defends Crackdown on Underground Fraternities*, PORTLAND PRESS HERALD, May 2, 1991, at 1D.

Much press has been devoted to debating and analyzing the so-called "political correctness" movement and its critics. See, e.g., Steven C. Bahls, *Political Correctness and the American Law School*, 69 WASH. U LQ 1041 and n.2 (1991); Steve France, *Hate Goes to College*, 76 A.B.A. J. 44 (1990); Barbara Schulman, *Feminists, Political Correctness, and 'Free' Speech*, SOJOURNER: THE WOMEN'S FORUM, Oct. 1991, at 19; Patricia J. Williams, *Blockbusting the Canon*, Ms., Sept./Oct. 1991, at 59; Marc Wortman, *Fighting Words*, YALE ALUMNI MAG, Oct. 1991, at 56.

47. Brief for Defendants-Appellees at 1, *Phelps v. President & Trustees of Colby College*, 595 A.2d 403 (Me. 1991) (No. CV-90-287).

48. MacMahon, Colby's attorney, said the students were disciplined for violating the college's rules and engaging in conduct that disrupted other students who were trying to sleep or study. . . . He said past court decisions have upheld the rights of colleges to make and enforce rules of conduct for students. "These plaintiffs all came to Colby knowing those rules. They chose to attend Colby knowing it was a non-fraternity college."

Colby Defends Crackdown on Underground Fraternities, PORTLAND PRESS HERALD, May 2, 1991, at 1D.

49. Brief for Defendants-Appellees at 22-30, *Phelps v. President & Trustees of Colby College*, 595 A.2d 403 (No. CV-90-287).

50. *Phelps v. President & Trustees of Colby College*, No. CV-90-287 at 15 (Me. Super. Ct., And. Cty., Aug. 22, 1990), *aff'd*, 595 A.2d 403 (Me. 1991).

ernment restrictions should not present a dilemma between the right to expression and the right to exclude expression because the government theoretically should not take sides in the marketplace of ideas and has no rights itself to free expression and association. But in applying a statute that bars private interference with First Amendment rights, the court confronts the separate First Amendment rights of the private interfering party.

The Superior Court quoted First Circuit Judge Frank Coffin's opinion in *Redgrave v. Boston Symphony Orchestra, Inc.*: "The freedom of mediating institutions, newspapers, universities, political associations, and artistic organizations and individuals themselves to pick and choose among ideas, to winnow, to criticize, to investigate, to elaborate, to protest, to support, to boycott, and even to reject is essential if 'free speech' is to prove meaningful."⁵¹ In that case, plaintiff Vanessa Redgrave had asserted a First Amendment right to perform with the orchestra regardless of her views on Palestinian rights. The orchestra, in turn, had asserted a First Amendment right to choose its performers based on its own preferences.⁵²

Turning to the Colby case, Justice Alexander observed that, "our constitutional freedom to associate, in private organizations, with persons of similar interests necessarily implies a right to exclude those with divergent interests."⁵³ The court resolved this conflict between the associational rights of the fraternity and the college by restricting the state Civil Rights Act to state action.⁵⁴ It narrowly interpreted the Act's phrase "rights secured by the constitution" to encompass only the right to be free from *state* interference with freedom of association and expression, despite the statute's additional phrase "whether or not under color of law."⁵⁵ Even though

51. *Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888, 904 (1st Cir. 1988), *cert. denied*, 488 U.S. 1043 (1989).

52. Judge Coffin, however, did not resolve these potential constitutional difficulties by rejecting the well-established precedent and the clear statutory language that allows the Massachusetts Civil Rights Act to reach private action. *Id.* at 900-01.

In response to certified questions from the federal court, several members of the Massachusetts Supreme Judicial Court stated that the Act does not impose liability where a defendant is exercising a right to be free from compelled expression. *Id.* at 909, 911-12. "[A] person exercising constitutional rights who interferes with another's constitutional rights is not . . . interfering with the rights of another person by 'threats, intimidation, or coercion,' " within the meaning of [the Massachusetts Act]." *Id.* at 907, quoting *Redgrave v. Boston Symphony Orchestra*, 502 N.E.2d 1375, 1377 (1987). Relying in part on this discussion of state law, Judge Coffin held that the orchestra was not liable under the Massachusetts Civil Rights Act and that it was unnecessary to reach federal constitutional issues. *Id.* at 911-12.

53. *Phelps v. President & Trustees of Colby College*, No. CV-90-287, at 16, (Me. Super. Ct., And. Cty., Aug. 22, 1990), *aff'd*, 595 A.2d 403 (Me. 1991).

54. *Id.*

55. Compare *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613-14 n.29 (1979) and *United States v. Guest*, 383 U.S. 745, 755 (1966) (right is "secured by" constitution if it is protected by the constitution) with *Guest*, 383 U.S. at 779 (Bren-

the Maine law was based on a similar Massachusetts Civil Rights Act, the court refused to follow the established Massachusetts precedent which interpreted that identical language in the Massachusetts Act as reaching private action.⁵⁶

On appeal, the Maine Supreme Judicial Court, sitting as the Law Court, affirmed the decision. The Law Court expanded on the lower court's concern about the issue of conflicting First Amendment rights. At oral argument, one Justice noted an inherent contradiction in the MCLU's defense of the fraternity's freedom of association right against private interference.⁵⁷ If the Maine Civil Rights Act requires Colby to sacrifice its associational values to tolerate those it wants to exclude (fraternities), then it would also require Colby's fraternities to sacrifice *their* associational values to tolerate those *they* want to exclude (women).

Civil liberties advocates left unanswered the question whether they would sue on behalf of women students who insisted on a freedom of association right to associate as members of Lambda Chi against the fraternity's wishes. Such a case is currently being brought against a Middlebury College fraternity.⁵⁸ Echoing the Colby fraternities in reverse, the Middlebury fraternity protested that its constitutional rights will be violated if it is forced to accept unwanted members—and that the college's demands that they accept women are “the latest outbreak of political correctness in the Northeast.”⁵⁹

In its decision refusing to favor the fraternities' associational rights over the college's associational rights, the Maine Law Court employed the same reasoning as the MCLU, with opposite results: “Even the most intolerant members of our society, however, enjoy, subject to the limitations imposed by law, the right of free speech and association.”⁶⁰ The attorney for the MCLU declared that the

nan, J., dissenting) (right can be “secured by” constitution if it “emanates” from constitution).

56. *Phelps v. President & Trustees of Colby College*, No. CV-90-287, at 13 (Me. Super. Ct., And. Cty., Aug. 22, 1990), *aff'd*, 595 A.2d 403 (Me. 1991), citing *Redgrave v. Boston Symphony Orchestra, Inc.*, 502 N.E.2d 1375 (Mass. 1987). For Massachusetts cases reaching private violations of constitutional rights, see *Bell v. Mazza*, 474 N.E.2d 1111 (Mass. 1985); *Batchelder v. Allied Stores Corp.*, 473 N.E.2d 1128, 1131 (Mass. 1985).

57. See Richard O'Meara, Esq., Oral Argument Before the Law Court in *Phelps v. President & Trustees of Colby College* (May 1, 1991) (tape recording on file with author).

58. Anthony Flint, *Greek Might*, BOSTON GLOBE, Apr. 6, 1991, at B1. The fraternity at issue in the Middlebury case, Delta Kappa Epsilon, includes in its male membership President Bush, Vice President Dan Quayle, and former President Gerald Ford. *Id.*

59. *Id.*

60. *Phelps v. President & Trustees of Colby College*, 595 A.2d 403, 407 (Me. 1991).

court's decision limiting the scope of the Maine Civil Rights Act "basically repeals the statute. It renders it meaningless from a civil rights standpoint."⁶¹ Justice Daniel Wathen's opinion for the court admitted, "We are mindful that our decision limits the potential utility of the Act as a means of combatting the actions of so-called hate groups."⁶²

The court nevertheless decided to limit the statute, refusing to allow the courts to "mediate disputes between private parties exercising their respective rights of free expression and association."⁶³ The decision in the Colby case, however, simply allows hate groups rather than the courts to "mediate" between private parties exercising their respective rights. Like the MCLU, the court argues that the need for neutrality justifies its choice to favor particular rights at the expense of others.

In the MCLU's view, the moral of liberal tolerance in the Colby fraternity case is that a possibly undesired result (permitting fraternities) in the short run is worth strict adherence to neutral principles in the long run (preventing private interference with free association and expression). Alternatively, the moral of the case from the court's view is that an undesired result in the short run (barring the statute from reaching violations of civil rights by private hate groups) is worth strict adherence to neutral principles in the long run (preventing the government from favoring some speech over others).⁶⁴

So a law designed by civil rights activists to fight hate group violence has been used to defend a group with a history of hate violence—with the result that the law can no longer be used against private hate groups.⁶⁵ The Colby fraternity case seems to present women and other people traditionally subjected to oppression with our typical choice of neutral principles:⁶⁶ either way, we lose. Either the law is interpreted broadly to establish the rights of private hate groups to interfere with our freedom of association, or the law is

61. *Court Backs Colby in Fraternity Suit*, PORTLAND PRESS HERALD, July 10, 1991, at 3D.

62. *Phelps v. President & Trustees of Colby College*, 595 A.2d at 407.

63. *Id.*

64. The contradictory use of neutral principles has been analyzed by the critical legal studies movement as evidence of the incoherence of the traditional liberal approach to law. See, e.g., Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979); MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 45-51 (1987).

65. The court could have resolved the conflict of rights in this case by an interpretation of the Act that would be more consistent with its legislative history and statutory construction. See *supra* note 52; *infra* text accompanying notes 219-22.

66. For another case which posed similarly bad choices, see *International Union, United Auto. Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, ___ U.S. ___, 111 S.Ct. 1196 (1991).

interpreted narrowly so that it cannot restrict the freedom of private hate groups to interfere with our civil rights.

IV. FEMINIST METHOD CONFRONTS LIBERAL LAW

How can feminist jurisprudence rewrite this story? The mainstream media tend to portray feminism as an offshoot (or a pawn⁶⁷) of liberalism.⁶⁸ Yet the dilemma posed by the Maine Civil Rights Act and the Colby fraternity case—one example of the current debate over “hate speech” and other so-called political correctness issues⁶⁹—brings to the surface some of the conflicts between liberal and feminist methodologies.⁷⁰

In the traditional liberal view of law, injustice is a problem of partiality. Liberal civil rights advocates seek to require us to surrender our personal biases to the control of rational principles so that we treat “others” who are “different” like ourselves. In the epitome of liberal ideology, the American Civil Liberties Union defends the rights of the Klan and the Nazis no matter how offensive the ACLU finds these groups.⁷¹ In this civil libertarian view, only by obeying neutral principles instead of personal feelings can everyone be protected from the prejudice and oppression that hate groups encourage.

In the Colby case, the MCLU argued that by protecting groups such as Lambda Chi, it will secure the freedom of the women and men who disagree with Lambda Chi's expressive activity. A leader of

67. Senator Orrin G. Hatch charged that Professor Anita Hill was simply a tool of liberal groups looking for an excuse to defeat the nomination of Justice Clarence Thomas when she testified that Thomas had sexually harassed her. Andrew Rosenthal, *A Terrible Wrong Has Been Done, But to Whom?*, NY TIMES, Sunday Oct. 13, 1991, § 4 at 1. Others developed this charge into a more elaborate story. See William Safire, *The Plot to Savage Thomas*, NY TIMES, Oct. 14, 1991, at A19.

68. By the terms “liberalism” and “liberal,” I mean to refer to the dominant political theory of contemporary Western society, which originated in the Enlightenment philosophy in seventeenth- and eighteenth-century Europe, and which emphasizes the primacy and autonomy of the individual in opposition to the state. See, e.g., JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Thomas I. Cook ed. 1947); JEAN JACQUES ROUSSEAU, *POLITICAL WRITINGS* (C. E. Vaughn ed. 1953); JOHN STUART MILL, *ON LIBERTY* (Gertrude Himmelfarb ed. 1974).

69. See *supra* note 46.

70. For some examples of scholarship contrasting liberal theory to feminist theory, see ZILLAH R. EISENSTEIN, *THE RADICAL FUTURE OF LIBERAL FEMINISM* (1981); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 155-250 (1989).

71. See, e.g., *Collin v. Smith*, 578 F.2d 1197, 1205-07 (7th Cir. 1978), cert. denied, 439 U.S. 916 (1978); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484 (1990) (hereinafter, Strossen, *A Modest Proposal?*); Nadine Strossen and Mary Ellen Gale, *The Real ACLU*, 2 YALE J.L. & FEMINISM 161 (1990); ARYEH NEIER, *DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE AND THE RISKS OF FREEDOM* (1979); Norman Dorsen, *Is There a Right to Stop Offensive Speech? The Case of the Nazis in Skokie*, in *CIVIL LIBERTIES IN CONFLICT* 133-34 (Larry Gostin ed. 1988).

the MCLU explained: "It is by defending the rights of unpopular groups that the rights of all people, including civil rights activists, anti-war protestors, and religious and political dissenters are protected. As Thomas Paine wrote, 'He that would make his own liberty secure must guard even his enemy from oppression, for if he violates this duty, he establishes a precedent that will reach to himself.'"⁷²

In the liberal view, I should start my legal analysis of the Colby case by putting aside my personal experiences with Lambda Chi, not by focusing on them—the opposite of the feminist method.⁷³ The liberal perspective narrates the Colby fraternity case as a classic example of the struggle between principle and emotion. According to this story, when I speak about fraternity violence against women, I'm talking about emotional personal experience. Those who speak about fraternity rights to freedom of expression are talking about universal rational principles. And in this story, when wayward emotion surrenders herself to the force of noble principle, both will live happily ever after.

But I'm using personal experiences with Colby fraternities to challenge the legal mythology that separates "neutral principle" from personal experience. By focusing on personal experiences of prejudice, feminist method can show that civil rights violations are often failures of perception as much as failures of principle.⁷⁴ Yet efforts to correct for this failure of perception are often attacked as failures of principle.

Law is about constructing reality as much as following principles. Being principled provides no security against being unjust when harm to women and others on the social margin is made invisible or irrelevant. As long as violence does not count as real, real violence will often be legal no matter how firmly it is outlawed.

72. Letter to the editor from Sally Sutton, Executive Director, Maine Civil Liberties Union, *ME. TIMES*, July 27, 1990, at 13. Thomas Paine's legacy persists in more ways than one: his eloquent assertion of civil liberties principles coincided with his support for laws criminalizing speech critical of the government. See David Kairys, *Freedom of Speech*, *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 242 (David Kairys ed., 2d ed. 1990) (citing LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* 347-48 (1985)).

73. For example, one response to my criticisms of the MCLU's position began: Her analysis is so flawed that I'm surprised that you printed it at all First, she uses personal experience to prove a rule. I have no doubt that she and others were in fact harassed and even worse by persons belonging to fraternities, and even persons acting in the name of certain fraternities. But this no more proves that fraternities are inherently male-dominated or violent than attacks by some Protestants against some Catholics and vice versa prove that all Catholics and Protestants are psychopaths. Seth Berner, *Counterpoint* The Newsletter of the National Lawyers Guild (Southern Maine Chapter), Nov. 1990, at 4.

74. See Rhode, *supra* note 17, at 1735 (describing "perception as the problem").

I recount my experiences with fraternities not to prove that fraternities should be banned as a general rule, but to explore how violence against women by privileged white men is often not perceived as real in our society. The Colby fraternity case is in part a dispute about gender. The fraternities at issue define themselves by their exclusion of all women.⁷⁵ The legal debate over the right to belong to fraternities exposes the boundaries of masculine identity, and raises questions about the principles and perceptions that shape that identity.

My personal stories of Colby fraternities demonstrate emerging interpretations of my own experiences, including my own denial and biased perceptions.⁷⁶ I am generalizing my personal experiences of some Colby fraternities as examples of misogyny, but not simply misogyny; the interaction of gender, race, class, and sexual identity produced a culture of denial of privileged male violence. Women of varied race, class, sexual, political and cultural identities and physical characteristics were targets of harassment by some of Colby's fraternities, in different forms and degrees. Yet women were by no means the exclusive targets. Fraternity violence and harassment against men often served to maintain a gendered hierarchy that not only subordinated those defined as female, but also subordinated men who were perceived as deviating from these fraternities' construction of masculinity.⁷⁷

Although the Colby fraternities were not all exclusively white, I

75. As a Colby student, I questioned the centrality of the fraternities' male identity—thinking that maybe the exclusion and subordination of women was an outdated habit many fraternities could be persuaded to discard. I gained a deeper appreciation of the problem when I circulated a petition urging fraternities to admit women: many of the brothers patiently explained to me that the bonds of loyalty, friendship, and respect that constitute fraternities cannot exist between men and women. One Colby woman spoke in support of the fraternities by explaining that women can avoid fraternity mistreatment "as long as they (frat brothers) view you as an intelligent and interesting person, rather than as a girl." Robin Yorks, *Women Speak Out On Frats*, COLBY ECHO, Mar. 14, 1980, at 7 (interviewing anonymous Colby student).

The exclusion of women still remains central to many college fraternities. See, e.g., Tess Nacelewicz, *Bowdoin Restricts Frats, Sororities*, ME SUNDAY TELEGRAM, Mar. 8, 1992, at 5B (announcing plans to fight ban on single-sex fraternity houses, fraternity leader "drew the line at admitting women"). A sociological study concluded that "fraternities are vitally concerned—more than with anything else—with masculinity." Patricia Yancy Martin & Robert A. Hummer, *Fraternities and Rape on Campus*, 3 GENDER & SOC'Y 457, 460 (Dec. 1989).

76. I take seriously admonitions against universalizing from personal experience, yet I believe it is neither possible nor useful to transcend all personal perspectives or to avoid any generalization. Instead, I hope to recognize my generalizations from my (white, economically privileged) experience as provisional and to hold them open to criticism and revision.

77. This fraternal masculinity is defined in terms of heterosexuality, class, race, and physical appearance. See, e.g., Martin & Hummer, *supra* note 75, at 460-61, 471.

believe it is fair to characterize Colby fraternities as predominately white, both in terms of membership and cultural focus.⁷⁸ I experienced fraternity harassment and violence exclusively from white men. My claim is that similar actions would not have provoked a comparable degree of institutional denial if these actions were perpetrated by organized groups predominantly composed of men of color or lower class white men against middle or upper class white women.⁷⁹

V. PERSONAL EXPERIENCES OF PRIVILEGED VIOLENCE

To live so completely impervious to one's own impact on others is a fragile privilege, which over time relies . . . on the inability of others . . . to make their displeasure heard.

—Patricia J. Williams⁸⁰

A. Normal Experience

When I was a Colby student, going to class meant getting up early and sneaking out the freight tunnel to avoid the fraternity pledges on the hall who blocked the doorways and held dorm women captive until we watched them pull their pants down.⁸¹ It meant risking the daily trauma of "frat row" (the central thoroughfare of the campus that was lined with seven fraternity houses⁸²), where we faced a gauntlet of fraternity men who drenched us with buckets of water, chased us with large nets, threw beer and other objects at us, yelled sexual insults at us, and rated us as sex objects.⁸³ Once, on her way

78. Colby's President William Cotter testified that one reason for the decision to ban Colby's fraternities was their encouragement of "racist behavior." Alberta Cook, *Judge Affirms Colby's Action Against 16 Seniors*, PORTLAND PRESS HERALD, May 25, 1990, at 10.

79. However, this systematic denial is not limited to violence perpetrated by privileged white men. For example, efforts to recognize battering in lesbian relationships are just beginning. See NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING (Kerry Lobel ed., 1986). The identity of the victim as well as the identity of the perpetrator shapes cultural and legal perceptions of violence. See *McCleskey v. Kemp*, 481 U.S. 279 (1987).

80. WILLIAMS, *supra* note 2, at 72.

81. A similar practice of some fraternity members on other campuses is often termed "bagging." ROBIN WARSHAW, I NEVER CALLED IT RAPE: THE MS. REPORT ON RECOGNIZING, FIGHTING AND SURVIVING DATE AND ACQUAINTANCE RAPE 108 (1988).

82. Peggy Reeves Sanday describes a similar structure called "the Walk" at one university marked by fraternity violence against women. SANDAY, *supra* note 42, at 25.

83. A 1980 student newspaper commentary supportive of fraternities nevertheless agreed that fraternity abuse of women was a serious problem: "Women [at Colby] really have not moved beyond the role of 'frivolous commodities,' . . . Until a woman can walk down frat row without the fear of being netted, soaked or rated, Colby students cannot claim that attitudes have changed." Erin Ireton and Sonia Turcotte, *Speaking from Chi Omega: Our Perspectives on Sexism and Frats*, THE COLBY ECHO,

across campus, one of my roommates suffered a broken ear drum when she was hit on the head and knocked off her bicycle by an object thrown at her from a fraternity balcony.⁸⁴

Campus life meant eating lunch to the sounds of women screaming in pain blasting from stereos from the tightly shuttered Lambda Chi house during "hell week." It meant returning to our dorm rooms to find notes on our doors from fraternity pledges containing sexual insults directed at us by name. It meant waking up at night to find our fraternity pledge classmates breaking into our dorm rooms in their underwear, or maybe just smashing telephones and furniture in the halls. It meant living with posters in my dormitory lounge listing which fraternity pledge on my hall was named "da balls" of the week and reporting whether he had accomplished sufficient sexual harassment of dorm women to earn his title.

It meant learning the rules of dominance and subordination: such as the rule that KDRs were not allowed to display affection toward women in public (my dorm advisor explained to new students how she secretly arranged to talk with her boyfriend by meeting behind the tea dispenser);⁸⁵ or the rule that the tables in the front of the dining hall were reserved for Lambda Chis and no women could sit there even when the tables were empty. It meant learning the language of women-hating—as in the term "ledging," which referred to the KDR ritual whereby the fraternity arranges for a gang of brothers to watch while a pledge has sex with a woman who is unaware of the brothers' participation.⁸⁶ It meant learning the habit of male

Mar. 7, 1980, at 19.

84. Although she reported this incident to the college, no disciplinary or legal action resulted from this incident, since no individuals could be identified (she had not seen who had hit her).

85. Peggy Reeves Sanday describes how some fraternity cultures construct sexual relationships:

As they dominate and control the women who satisfy their sexual desire, the brothers separate sexual feelings from emotions of love and compassion. Such emotions are reserved for brothers. Party sex is the glue that binds the brothers to the fraternity body. The fraternal bond helps to transform infantile feelings of dependency on women by transferring these feelings to men.

SANDAY, *supra* note 42, at 37.

86. My impression as a Colby student was that the term "ledging" originated from the KDR fraternity's location: the rock ledges from an old quarry outside the fraternity house's picture windows were rumored to provide a convenient setting for viewing into bedrooms. An elder local resident recently told me that this quarry was the site of Ku Klux Klan rituals in the 1930s, when the Klan was actively persecuting French-Canadians in Maine.

Another version of the origins of the term "ledging" is that it "refers to the woman's being driven to the point of suicide by the harassment" that the woman (traditionally a first-year student) receives afterwards. WARSHAW, *supra* note 81, at 109.

The practice of groups of fraternity brothers watching one brother have sex with a woman, without the woman's knowledge, is a ritual found in similar forms in other

ownership and female deference so well that ten years after graduating one woman returning to visit the campus tells me she unconsciously walks out of her way to avoid what was once fraternity row.

Above all, this everyday life with fraternities at Colby meant learning to count injustice as normal, and to discount white male fraternity violence as unreal.

B. *Privileged Injustice*

Why did my experiences of assault and harassment by Colby fraternity members seem like normal life instead of grave injustice? Colby did not lack good people with good principles. But their principles often appeared to be built from emotional attachments to old stories that told about evil coming from distant others, not from liberal, well-educated white men like themselves.

Here are some experiences of firm principles and failed perception:

It was 1978, at Colby College. My sociology professor told our class his liberal solution to crime: we shouldn't punish criminals or try to rehabilitate them by controlling their behavior. Instead we should integrate criminals into communities that encourage positive goals. He told us he had designed an alternative sentencing program that would provide convicted young men with the opportunity to live in the dorms of elite liberal arts colleges like Colby so that the student community could re-socialize them with good values. I couldn't articulate why his theory bothered me. I didn't talk in his class.

It was 1979. One of my favorite professors, a wise and loving man, was leading a class discussion about ethics and equality. He told us about his experiences with the black civil rights movement. He spoke of how deeply moved he felt watching a young black girl quietly walking to school through a gauntlet of angry white southerners throwing things and shouting insults at her.

Next he talked about the women's movement. Sexism seemed different and less extreme to him than racism, not to mention separate.⁸⁷ He did not think that gender-based violence is often used to subordinate women. He returned to the image of the black girl walking to school through the crowd of jeering, threatening whites, and said he didn't think that kind of explicit prejudice based on gender exists.

fraternities. See SANDAY, *supra* note 42, at 32 (describing the practice of "beaching" at one fraternity).

87. This class (myself included) apparently began from the biased premise that the "women" who were the subject of our discussion on sexism were white, and that the white violence we were discussing against black women was solely a problem of racism. For criticisms of the traditional legal separation of race and sex discrimination, see *supra* note 20.

For the first time in that class, I spoke up. I said that signs had just been posted around campus warning that a female student had been assaulted while running on a rural road near campus and that women should not run alone. I said that I felt restricted and unequal because of this violence. No one mentioned fraternity row.⁸⁸

VI. PRINCIPLED FANTASIES OF SELECTIVE SUFFERING

The liberal dichotomy between universal principle and individual preference ends up privileging certain experiences as principles and discounting marginalized perceptions as individual preferences. The separation of universal principle from particular experience reenforges a system of implied presumptions (sometimes seemingly ir-rebuttable) that perceptions by people of color and white women are not credible, particularly if those perceptions speak of oppression and contradict the perceptions of privileged white men.⁸⁹

88. The denial of abusive fraternity behavior sometimes took absurd proportions, similar to the denial shown by families who go to great pains to contort reality in order to protect an alcoholic from being discovered. One student tried to persuade college authorities to remove a sheep traditionally used in initiation rituals and kept tied in plain view for several days outside the Lambda Chi house directly across from what was then the student center. Officials denied that there were any sheep on campus, and only agreed to remove the sheep when the student said that she planned to notify state animal welfare authorities. A newspaper story recently told of failed perceptions at another elite Maine college: "Bates College officials in Lewiston reacted with dismay this week after learning of a decades-long practice of prohibiting French employees from speaking their language when English-speaking people are around." Karlene K. Hale, *Bates College Officials Shocked: Didn't Know Certain Workers Barred from Speaking French*, KENNEBEC JOURNAL, Nov. 21, 1991, at 6. The rule applied to cafeteria and maintenance workers. Lewiston, the city where Bates is located, has one of the largest French-Canadian communities in the state.

The dean of the college insisted that "No one, except in those isolated pockets, was aware of [the policy]." *Id.* Although college officials took swift and strong action to end the practice and to affirm the college's desire to "celebrate their multiplicity," the fact that "no one" was aware of a policy that was enforced for more than a decade on many workers contained in "isolated pockets" suggests that campus multiplicity has had little to do with college officials' reality. *See id.*

89. Patricia J. Williams describes these presumptions:

[T]he social consequence of concluding that we are liars operates as a kind of public absolution of racism—the conclusion is not merely that we are troubled or that I am eccentric, but that we, as liars, are the norm. . . . It is interesting to recall the outcry in every national medium, from the *New York Post* to the *Times* to the major networks, in the wake of the [Tawana] Brawley case: who will ever again believe a black woman who cries rape by a white man? . . . Now shift the frame a bit, and imagine a white male facing a consensus that he lied. Would there be a difference? Consider Charles Stuart, for example, the white Bostonian who accused a black man of murdering his pregnant wife and whose brother later alleged that in fact the brothers had conspired to murder her. . . . There was not a story I could find that carried on about "who will ever believe" the next white man who cries murder.

WILLIAMS, *supra* note 2, at 242-43 n.5.

Some criticisms of traditional "masculinist" legal method draw on the work of Carol Gilligan to advocate for greater emphasis on personal relationships as opposed to abstract principles, or for an "ethic of care" along with the prevailing "ethic of justice."⁹⁰ My argument, however, is that the identification of principled, rational abstract reasoning with men and emotional, relational values with women indicates ideology more than reality. Our society tends to interpret privileged white men's particular emotional attachments as rational, universal principles, and to discount others' particular emotional attachments as personal feelings.⁹¹ In the dominant ideology, privileged men's feelings are principled; women's feelings are personal.

A. *Feeling Principled*

In the Colby fraternity lawsuit, most of the discussion in the media and in the legal community has focused on the fraternity members' perspective. The public discussion of the Colby fraternity case shows a vivid and passionate imagining of the harms that could result from denying fraternity membership. Newspapers described how Colby "smashed" its third underground fraternity in two years,⁹² and how Colby "trampled" the rights of students.⁹³ When I criticized the MCLU's position, one civil rights lawyer condemned

90. See, e.g., Kenneth L. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447; Carrie Menkel-Meadow, *Portia in a Different Voice*, 1 BERKELEY WOMEN'S L.J. 39 (1985); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988). Carol Gilligan analyzed how traditional standards of legal and moral reasoning are white male-biased. See CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982); Ellen C. DuBois, et al., *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFF. L. REV. 11 (1985).

91. There has been increasing interest in pragmatism and contextual analysis in contemporary legal theory and political philosophy. See, e.g., *Symposium on the Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990) [hereinafter *Symposium*].

"[W]e emphasize 'context' in order to expose how apparently neutral and universal rules in effect burden or exclude anyone who does not share the characteristics of privileged, white, Christian, able-bodied, heterosexual, adult men for whom those rules were actually written." Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1601 (1990). Minow and Spelman explain that contextual reasoning does not mean relinquishing principled reasoning and favoring relativism or unrestrained power: "Indeed, some arguments against contextual decisionmaking of any sort suggest a contrast between abstraction and context. . . . We will argue instead that we are always in some context, as are the texts that we read, their authors and readers, our problems, and our efforts to achieve solutions." *Id.* at 1605.

"Principles such as equality, fairness, and freedom can be defended and even fulfilled in light of contextualized assessments of the limitations of particular rules, given the frames of references of their authors and their expositors and given evidence of the actual effects of rules on people." *Id.* at 1632.

92. *Frat Action May Violate Civil Rights*, ME TIMES, Apr. 27, 1990, at 7.

93. Daniel L. Austin, *MCLU Claims Colby Trampled Rights of Underground Fraternity Students*, CENT. ME. MORNING SENTINEL, Aug. 9, 1990, at 2.

me for "applauding" Colby's "draconian" use of "brute force."⁹⁴

The MCLU described how Colby "engaged in active combat" against "unrecognized associations to which some of its students choose to belong."⁹⁵ According to the MCLU, Lambda Chi was "forced to curtail the fraternity's traditional expressive activities" and "to associate in secret out of fear."⁹⁶ A national fraternity leader protested that Colby's President William Cotter "and his hand-picked thought police regiment have advanced repression to new heights."⁹⁷

The media encouraged the public to identify emotionally with the punished fraternity men. One liberal news story began its story on the case by putting its readers in the shoes of fraternity members as victims of an injustice of historic proportion. "Are you now, or have you ever been, a member of a nonsanctioned Greek letter association while attending Colby College in Waterville? If the answer is yes, don't admit it . . . unless you want to be blackballed from your own graduation or suspended for a semester."⁹⁸ The article did not invite readers to identify with any of the students who supported Colby's ban on fraternities or who had been terrorized by Lambda Chis.

Another news columnist was more dramatic in his personal identification with the punished Lambda Chi brothers, most of whom were on the college football team.⁹⁹ He imagined himself as the fa-

94. Seth Berner, *Counterpoint*, The Newsletter of the National Lawyers Guild (Southern Maine Chapter), Nov. 1990, at 4. My criticism of the fraternities' right to associate at Colby College led this civil rights lawyer to apocalyptic imagery: "Her torching of reality threatens to doom in the flames me, you and everyone else." Letter to the editor from Seth Berner, *CASCO BAY WEEKLY*, Aug. 22, 1991, at 17.

95. Reply Brief of Plaintiffs-Appellants at 19-20, *Phelps v. President & Trustees of Colby College* (No. AND-90-511).

96. Plaintiffs' Trial Brief at 23, *Phelps v. President & Trustees of Colby College* (No. CV-90-287), *aff'd*, 595 A.2d 403 (Me. 1991).

97. Written statement of George E. McElroy, executive director of Zeta Psi Fraternity, quoted in *Colby Defends Crackdown on Underground Fraternities*, *PORTLAND PRESS HERALD*, May 2, 1991, at 1D, 2D.

A few years earlier, one fraternity member began his anonymous letter to the student newspaper by equating the ban on fraternities to some of the worst atrocities in human history.

Dith Pran: Genocide in Cambodia

Elie Wiesel: Genocide in Europe

Richard Hovannisian: Genocide in Armenia

How ironic it is that these lecturers have been invited to a school which at this moment is practicing its own form of genocide. Let's face it, the current administration and certain malicious faculty members have been executing a program intended to completely eliminate a breed of people at Colby—the fraternity member.

Anonymous letter to the editor, *COLBY ECHO*, Apr. 17, 1986, at 9 (discussed in Hokanson, *supra* note 31, at 20).

98. *Frat Action May Violate Civil Rights*, *ME TIMES*, Apr. 27, 1990, at 7.

99. Tom Hanrahan, *The Surreal State of Colby Football*, *CENT ME MORNING SENTINEL*, Apr. 24, 1990, at 13.

ther of a Lambda Chi. In his view, to hear your son tell you he's being kicked out of school for joining a fraternity is "wildly absurd."¹⁰⁰ He explained, "To play football without trying to win is more offensive to me than any amount of hazing, beer drinking or wolf whistles. . . . [L]osing is bad for a young man's soul [Colby's football] program will become a laughingstock, all because a gang of bleeding heart liberals decided fraternities are akin to the Khmer Rouge and L.A. street gangs."¹⁰¹

This columnist made explicit beliefs that others held more discreetly about the seriousness of men's feelings and the foolishness of women's complaints. And he made clear the pervasive presumption that violence by groups of predominantly white college men is at worst immature fun, while *real* violence is something done by people of color in faraway jungles like Southeast Asia and Los Angeles.¹⁰²

This selective identification with the sufferings of privileged males took on fantastic proportions in one law journal article defending the rights of fraternities¹⁰³ (cited by the plaintiffs-appellants brief in the Colby case¹⁰⁴). The author rejects arguments that women's societal disadvantages may in some circumstances justify greater legal protections for exclusively female organizations than for exclusively male organizations.¹⁰⁵ Citing a study of widespread campus gang rape as evidence that college men suffer from lower self-confidence than women, the author implies that such male violence against women means that men, not women, may be the more disadvantaged group.¹⁰⁶

100. *Id.*

101. *Id.*

102. For discussions of the interrelationship of racism and sexism in U.S. society, and how this interrelationship serves to deny violence against women of color and white women by white men, see, for example, BELL HOOKS, *AIN'T I A WOMAN BLACK WOMEN AND FEMINISM* 51-86 (1981); Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103 (1983); Alisa Solomon, *Unreasonable Doubt: Speaking Out is the Contested Ground of Credibility*, VILLAGE VOICE, Aug. 6, 1991, at 25 (comparing trial which acquitted white St. John's University students charged with sexual assault of a black woman with trial of black teenagers accused of assaulting a white woman in Central Park jogger case).

103. Gregory F. Hauser, *Social Fraternities at Public Institutions of Higher Education: Their Rights Under the First and Fourteenth Amendments*, 19 J. OF LAW & EDUC 433 (1990).

104. Reply Brief of Plaintiffs-Appellants, *Phelps v. President & Trustees of Colby College*, 595 A.2d 403 (No. AND-90-511), at 19.

105. Hauser, *supra* note 103, at 1 n.4, citing Chai Feldblum et al., *Legal Challenges to All Female Organizations*, 21 HARV. C.R.-C.L. L. REV. 171 (1986).

106. Hauser, *supra* note 103, at 1 n.4, citing J. EHRHART & B. SANDLER, *CAMPUS GANG RAPE: PARTY GAMES?* 5 (Project on the Status of Women, Association of American Colleges 1985).

A cultural obsession with male suffering is astutely described by Eve Kosofsky Sedgwick as part of her analysis of the incoherences in the construction of modern male heterosexuality:

B. *Feeling Fantasized*

In contrast to the dramatic harm associated with prohibiting Lambda Chi membership, the public discourse about the Colby case shows a constant turning away from and trivializing of the evidence of fraternity violence. The Civil Liberties Union presented Lambda Chi's history as a series of charity fundraisers and political debates.¹⁰⁷ When I wrote about being forced into a bedroom and

Much might be said . . . about the production and deployment, especially in contemporary U.S. society, of an extraordinarily high level of self-pity in nongay men. Its effects on our national politics, and international ideology and intervention, have been pervasive. (Snapshot, here, of the tear-welling eyes of Oliver North.) In more intimate manifestations this straight male self-pity is often currently referred to (though it appears to exceed) the cultural effects of feminism, and is associated with, or appealed to in justification of, acts of violence, especially against women.

EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 145 (1990).

A recent and well-publicized manifestation of the "vast national wash of masculine self-pity" that Sedgwick describes (*id.*) is Robert Bly's version of the "men's movement." Bly mourns not the history of oppression caused by privileged white heterosexual men in the United States, or the pain of their victims, but the resulting shame that has plagued this privileged masculinity. See Bill Moyers & Robert Bly, *A Gathering of Men*, 1990 (videotape of television program, available from Mystic Fire Video); ROBERT BLY, *IRON JOHN* (1990).

107. From the MCLU Law Court brief, under the heading "The Original Lambda Chi Alpha Fraternity":

The brothers of LCA [prior to the fraternity ban in 1984] frequently associated for social, educational, and charitable events which included expressive activity entitled to protection under the First Amendment. These activities included the fraternity's annual Skate-a-thon to benefit the Pine Tree Camp for handicapped children, its annual Big Brother/Big Sister Christmas Party, as well as events dedicated to the discussion and debate of issues of concern to society, such as the "Fraternity Forum" programs that brought faculty members and other prominent speakers, such as Governor Brennan and Attorney General Tierney, to the LCA house, and a literary society which was formed during the spring 1983 semester.

Brief of Plaintiffs-Appellants at 2, *Phelps v. President & Trustees of Colby College*, 595 A.2d 403 (No. AND-90-511) (citing Transcript at 55-58).

The brief omits the legal events inspiring the formation of the literary society and political forums. Lambda Chi, represented by one of the attorneys who later brought this MCLU case, was for the first time faced with a property tax assessment by the city of Waterville. The fraternity successfully challenged the tax in Maine's highest court, in part by using the argument that Colby's fraternity houses are "literary and scientific institutions" exempt from local taxes. *Alpha Rho Zeta of Lambda Chi Alpha, Inc. v. City of Waterville*, 477 A.2d 1131, 1133 (Me. 1984). See *Fraternities to Fight Property Taxes*, COLBY ALUMNUS, Fall 1980, at 2. A letter in the campus newsletter recalls the amused campus reaction to this argument:

To the Editor: I would like to thank those members of frat row who in the past felt it their duty to harass me and other members of my sex. To date I have only been verbally abused and propositioned three times this fall. Furthermore, not even one water balloon or cup full of beer has been thrown in my direction . . . You boys ought to be proud of your remarkable achievements, but literary and scientific institutions. . .? See you at room draw.

Sue Miller, COLBY ECHO, Dec. 10, 1981, at 19.

knocked to the floor by pledges trying to sexually assault me, the MCLU responded by saying that I was speaking of "potential" violence.¹⁰⁸

In its brief to the Law Court, the MCLU described the college's concerns about Lambda Chi's effect on other students as "stated sentiments" indicating a "philosophical disagreement"¹⁰⁹ with an "unpopular"¹¹⁰ group that "may fall out of favor" because of a "perceived" adverse impact on the campus.¹¹¹ The MCLU contrasted the Colby case to antidiscrimination cases showing a compelling interest in limiting free association.¹¹² According to the MCLU:

All that Colby must do under the MCRA [Maine Civil Rights Act] is refrain from taking affirmative, intentional actions to interfere with the rights of those who choose, on their own time, to be members of a fraternal organization which has no official affiliation with the college. . . .

Given . . . the ever so slight encroachment on Colby's "freedom" to intimidate its own students (assuming Colby is entitled to assert such an associational right in the first place), this Court cannot help but find that Colby's alleged constitutional defense must fail.¹¹³

108. Letter to the editor from Sally Sutton, MCLU Executive Director, *M&E TIMES*, July 27, 1990, at 13, in response to Martha McCluskey, *Banning Fraternities: Whose Civil Liberties?*, *M&E TIMES*, July 13, 1990, at 13. That essay did not give as detailed an account of my experience of assault as this Article does. Initial accounts that understate sexual violence may be used as evidence of its fabrication. When she testified in graphic detail about her alleged sexual harassment by Justice Clarence Thomas, Anita Hill was questioned about failing to give these details in her first report to the FBI. See *Excerpts From Senate's Hearings on the Thomas Nomination*, *NY TIMES*, Oct. 12, 1991, at 12 (questioning by Senator Arlen Specter).

109. Reply Brief of Plaintiffs-Appellants at 6, 16, 17, *Phelps v. President & Trustees of Colby College*, 595 A.2d 403 (No. AND-90-511).

110. Letter to the editor from Sally Sutton, MCLU Executive Director, *M&E TIMES*, July 27, 1990, at 13.

111. Reply Brief of Plaintiffs-Appellants at 6-7, *Phelps v. President & Trustees of Colby College* (No. AND-90-511).

112. *Id.* at 15-16, 32-33. The MCLU admitted that "the right of expressive association is not absolute," and can be restricted in the face of "compelling state interests." *Id.* at 15. It conceded that eradicating discrimination was a compelling state interest in cases requiring the Jaycees and Rotary clubs to admit women, noting that adding women would not significantly diminish those organizations' expressive activities. *Id.* at 15-16.

113. *Id.* at 32-33 (footnote omitted). In revealing whose rights are presumed to be the standard, the MCLU brief used "he" as the generic pronoun when talking generally about persons with rights under the Maine Civil Rights Act. See *id.* at 7. For discussions of legal presumptions that particular persons are the standard for determining supposedly universal rights, see Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 *COLUM. L. REV.* 1118, 1152-59 (1986); CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 32-45 (1987); Martha Minow, *Foreword: Justice Engendered*, 101 *HARV. L. REV.* 10, 31-57 (1987).

Legal publications commenting on the case similarly erased the problem of fraternity violence from their reports on the case. A Maine Bar Journal article summed up the fraternity case by saying that Colby's decision to punish fraternity membership was comparable to the college disciplining students for organizing an off-campus art show.¹¹⁴ That article passed off as vague speculation Colby's argument that other students had First Amendment rights to attend college and to associate in an environment free of any fraternities.¹¹⁵ The *Maine Lawyer's Review* similarly analyzed the case under the headline "Court Decision Gives College Powers to 'Police' and Punish Off-Campus Activities," without any mention of the reasons Colby banned fraternities and without any mention of any on-campus problems relating to fraternities at Colby.¹¹⁶ That article summarized the question posed by the decision as follows: "How Colby College could forcefully impress its regulations on allegedly constitutionally protected off-campus associations and activities of its students."¹¹⁷

Among a group of local progressive civil rights lawyers preparing an amicus brief in the Colby fraternity case, the predominant concern was that the Law Court would narrow the Maine Civil Rights Act so that it would not protect against the "real" threats to civil rights posed by private hate groups like the Klan and skinheads. Their goal was to overcome the court's emotional reaction to the description of the fraternities as silly, immature kids with a penchant for tearing off chicken heads. These lawyers had no serious concern that certain college fraternities could be a threat to civil rights.¹¹⁸

C. *Feeling Fundamental: The Thomas Hearings*

A similarly selective emphasis on protecting privileged men's feelings was excruciatingly evident in the Senate confirmation hearings for Judge (now Associate Justice) Clarence Thomas. The public airing of Professor Anita Hill's story, and the intensity of many women's identification with her experiences, presented a major chal-

114. Patrick S. Bedard, *Maine Civil Rights Act*, 6 ME. BAR J 76, 84 (1991).

115. *Id.*

116. ME. LAWYER'S REVIEW, Oct.-Nov. 1991, at 13.

117. *Id.*

118. I don't mean to diminish the harms of racist groups, or to suggest that certain fraternities are necessarily as dangerous as groups that have a history of murder. I believe the harms caused by certain skinheads and the Klan may have been more perceptible to white, middle-class attorneys because the predominant stereotype is that perpetrators of Klan and skinhead violence are working class and poor whites. Progressive attorneys may have felt a greater sense of identity with groups of elite liberal arts college men; fraternity members are much more likely than skinheads or Klan members to hold positions of economic and social power in legal circles in Maine.

lenge to the dominant fiction that sexual oppression is abnormal—not caused by apparently nice, well-educated, successful men.¹¹⁹ As in the Colby fraternity case, the strong emotional attachments to this fiction were anxiously covered up by resorting to the liberal ideology of neutral principles.

Sensational imagery magnified the harm to Thomas from the accusations¹²⁰ while bizarre speculations and contortions of the evi-

119. On the other hand, it played into white racist stereotypes of black sexuality.

In one version of the attempt to defend this fiction, one op-ed writer agreed that the sexual harassment charges brought against Clarence Thomas reflect everyday, normal events, but went on to argue that it is elitist to interpret these events as anything other than normal, pleasant human interaction.

[The Thomas hearings] also revealed one of [our system's] greatest weaknesses: there are serious misperceptions of what is really going on in our society, and lamentable failure in our threadbare, predominantly liberal discourse on it.

. . . .

One revealing feature of these hearings is the startling realization that Judge Clarence Thomas might well have said what Prof. Anita Hill alleges and yet be the extraordinarily sensitive man his persuasive female defenders claimed. American feminists have no way of explaining this.

Orlando Patterson, *Race, Gender and Liberal Fallacies*, N.Y. TIMES, Oct. 20, 1991, § 4, at 15. It is interesting that in the face of at least a decade of exhaustive explanation by American feminists about the social and political processes that implicate "normal" men in sexual abuse, the New York Times continues to prefer writers lamenting the same feminist silence that it routinely perpetuates. See Edward S. Herman *The "Best Man"*, Z MAG. 9, Oct. 1991 (on the New York Times' censorship of leftist and feminist black scholars); MacKinnon, *supra* note 8, at 13 (on The New York Times' censorship of her op-ed commentary on a sexual harassment case).

120. Mr. Chairman, something has happened to me in the dark days that have followed since the F.B.I. agents informed me about these allegations. And the days have grown darker as this very serious, very explosive, and very sensitive allegation, or these sensitive allegations were selectively leaked in a distorted way to the media over the past weekend.

. . . .

I have never, in all my life, felt such hurt, such pain, such agony. My family and I have been done a grave and irreparable injustice.

. . . .

I have endured this ordeal for 103 days.

. . . .

This is not American. This is Kafkaesque.

. . . .

Mr. Chairman, I am a victim of this process. My name has been harmed. My integrity has been harmed. My character has been harmed. My family has been harmed. My friends have been harmed. There is nothing this committee, this body, or this country can do to give me my good name back. Nothing.

I will not provide the rope for my own lynching, or for further humiliation.

Judge Clarence Thomas, Opening Statement before the Senate Judiciary Committee, Supreme Court nomination hearings (Oct. 11, 1991) (*reprinted in* N.Y. TIMES, Oct. 12, 1991, at 10).

If the accusations had been successful in defeating the nomination, Thomas would

dence discounted and distanced the harm to Hill from any sexual harassment.¹²¹ The Thomas hearings, like the Colby case, suggest that the fact that one position is called "principled" and another "emotional" often has more to do with misogyny than with reason, law, or ethics.

For example, in a speech explaining his vote to confirm Justice Thomas, Maine's Senator William Cohen set himself off as a lonely champion of lofty principle, in opposition to what he casts as the emotional, fashionable position against Thomas.¹²² Cohen began his speech by insisting that he abhors sexual harassment. After this showing of concern for women, he concluded that the issue was principle, not the harm caused by sexual harassment:

But the Senate is not being asked to rule on the scope of sexual harassment in America today.

. . . The central question has been how to resolve the issue of doubt—in favor of Clarence Thomas or against him.

To resolve it in his favor immediately opens one to the charge of callous disregard of an issue of immense importance to the women of this country. To resolve it against him rejects a notion of fundamental fairness that the accuser bears the burden of proof in our society.

. . . .
 . . . [T]he easy thing and the popular thing for me to do would be to vote "no." History might show it might be the right thing to do. Mr. President, I do not believe it is the fair thing to do under these

have been left with one of the more powerful legal positions in the country—D.C. Circuit Court Judge. See *PEOPLE MAG.*, Nov. 11, 1991, cover story for one example of a dramatization of Justice Thomas's suffering and hurt feelings. For a view of the Thomas statement as a narrative of divine crucifixion and resurrection, see Patricia J. Williams, *The Bread and Circus Literacy Test*, Ms., Jan.-Feb. 1992, at 35-37.

121. For bizarre speculations, see Senator Arlen Specter's attempt to attribute Hill's sexual harassment allegations against Thomas to mental instability by introducing an affidavit claiming that Hill had once made a statement to a man at a party indicating she had believed the man might be romantically interested in her. *Excerpts from Senate's Hearings on the Thomas Nominations*, *NY TIMES*, Oct. 12, 1991, at 12, 14. Comments from members of the public on Anita Hill's testimony:

"I suppose he did harass her a little bit," Ms. Nierling said, as the image of Judge Thomas flickered across her television screen, his eyes welling with tears. "I personally believe he probably did all of those things" she said. "But they're making too big a deal out of it. It's not like he's been raping women and beating children."

Dirk Johnson, *Puzzled and Disgusted, But Fixated on Hearings*, *NY TIMES*, Oct. 14, 1991, at A16. For an example of the possible harm to Hill resulting from her testimony, see *State Legislator Seeks Hill's Ouster*, *NY TIMES*, Oct. 16, 1991, at A21.

122. 137 CONG. REC. S14682-83 (daily ed. Oct. 15, 1991) (statement of Sen. Cohen) (copy sent to constituents who urged Cohen to vote against Thomas). Catharine MacKinnon criticizes a similar technique in another context: "Cross-burning should not be romanticized as a lonely and unheeded critique of a powerful *status quo*." Brief *Amicus Curiae* of the National Black Women's Health Project in Support of Respondent at 23, *R.A.V. v. City of St. Paul*, cert. granted, 111 S.Ct. 2795 (1991).

circumstances. For that reason, I intend to support his nomination.¹²³

Cohen's speech constructs the Thomas vote as a choice between an issue important "to women" on the one hand and, on the other hand, "fundamental fairness." By opposing issues affecting women with issues of fairness, Cohen makes the choice simple and the conclusion obvious. He assumes that the concern about sexual harassment is an issue particular to women, rather than a universal, neutral principle—fundamental fairness. Even more interesting is the extent to which he takes this ideology of "neutral" principle: concern about harm to women is not just "easy" and "popular" but the opposite of justice itself. Cohen implies that the essence of fundamental fairness is the decision to reject concerns about protecting women in favor of concerns about protecting men.¹²⁴

While Republicans like Cohen asserted that their fears of harm to accused male officials raise fundamental principles, Democratic leadership reinforced support for Thomas by assuming that concerns about the harms of official sexual harassment are fundamentally personal. Senate Majority Leader George Mitchell (Maine's other Senator) voted against Thomas with an eloquent speech but "made no effort to rally other Democrats to do the same."¹²⁵

In defending his lack of leadership on the vote, Mitchell explained that "he believed the decision should be made individually and should not be influenced by partisan politics."¹²⁶ In his view, the Thomas vote was one that ought to be based "on the conscience and judgment of each senator."¹²⁷ Mitchell treated the sexual harassment allegations against Thomas as personal, not political; a matter to be resolved by individual experience, not by principled persuasion.¹²⁸

123. 137 CONG. REC. S14682-83 (daily ed. Oct. 15, 1991) (statement of Sen. Cohen) (copy sent to constituents who urged Cohen to vote against Thomas).

124. In contrast to how the dichotomy between principle and emotion was used in support of Justice Thomas, a woman's attempt to reject easy responses to immediate emotional interests in favor of long-term goals was described in language suggesting cold, selfish aloofness rather than lofty, admirable principles. In a lukewarm attempt to consider the validity of Anita Hill's perspective, Cohen speculated that "she buried Judge Thomas' offensive conduct deep within her soul and chose to maintain a friendly relationship in order to protect and further her professional career." *Id.* at S14682.

125. Steve Campbell, *Mitchell's Lack of Lobbying Disappoints Women's Groups*, KENNEBEC JOURNAL, Oct. 15, 1991, at 4.

126. *Id.*

127. *Id.* Patricia J. Williams writes eloquently about how government officials similarly use "privatization" of official responses to white racist violence to avoid public responsibility. WILLIAMS, *supra* note 2, at 64.

128. Another current manifestation of the gendered nature of the "principled" ideal is the concept of "NIMBY" (Not In My Backyard). "NIMBY" is used to describe environmental activism motivated by what is viewed as parochial personal in-

Both the Colby case and the Thomas hearings show how the male-biased perceptions that dominate legal and popular culture magnify harm to privileged men and minimize harm to others. Applying "neutral" principles to these biased perceptions means that the civil rights of women and other traditionally subordinated groups will tend to be overlooked or discounted when these threaten privileged men's interests.¹²⁹ In fact, the call to "principle" was used to encourage identification with privileged hurt and to block consideration of harm to others.

VII. PRINCIPLED EXPERIENCES OF HARMFUL EXPRESSION

A. *Tolerating Speech, Punishing Action*

In the liberal refrain, tolerance for one means tolerance for all.¹³⁰ In this view, rights to free expression do not conflict with others' rights. The theory is that any harm caused by hateful speech can be remedied by more speech, serving as an opportunity for robust debate and education as opposing views are aired.¹³¹ Defending fraternity members' right to associate was supposed to protect similar

terest rather than principled concern about the public welfare. See Orlando Delogu, "Nimby" is a National Environmental Problem, 35 SD L REV 198-219 (1990). In her discussion of the connections between devaluation of women and nature in dominant American culture, Anne Simon notes that much locally based environmental organizing against toxic waste dumps (often referred to as examples of NIMBYism) is led by women. Anne E. Simon, *Whose Move? Breaking the Stalemate in Feminist and Environmental Activism*, 2 U.C.L.A. WOMEN'S L.J. 145 (forthcoming 1992) (manuscript at 160 n.55, on file with author). As Simon suggests, in a culture that traditionally trivializes the broad public value of women's work in the home, the house-keeping image invoked by the term "NIMBY" (keeping backyards clean) may similarly serve to trivialize the public value of local efforts to fight environmental pollution.

A cartoon about Maine's budget crisis contained a graphic illustration of the gendered connotations of the NIMBY epithet in another context. The cartoon showed a group of men sitting around a table in a room marked "Budget Committee." The one female figure at the table was marked by the label "NIMBY," and the caption read, "Just mention cuts in state services and watch her go into action." Locke, *Cartoon*, ME. SUNDAY TELEGRAM, Nov. 17, 1991, at 6C.

129. For an analysis of how civil rights laws have had more effect on blue collar employment than on professional middle- or upper-class jobs, see Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV L REV 947 (1982).

130. The Kantian categorical imperative, Western philosophy's archetypal universal principle, asserts that we should choose ethical rules that can be consistently and neutrally applied to all, regardless of personal preference or experience; in other words, we must choose rules that treat other "rational beings" as autonomous, rule-making ends in themselves, rather than merely as means to our ends. See IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* (Lewis W. Beck trans., 1959).

131. "In the context of countering racism on campus, the strategy of increasing speech—rather than decreasing it—not only would be consistent with first amendment principles, but also would be more effective in advancing equality goals." Strossen, *A Modest Proposal?*, *supra* note 71, at 562.

rights of African-American student groups, or lesbian and gay student groups.¹³² Prohibitions on violent or threatening behavior from hate groups like the Klan are supposed to sufficiently protect the rights of victims of these hate groups.¹³³

When the Colby administration asked students' opinions on whether the Lambda Chi members should be punished for fraternity membership, a number of students asserted a right to choose to associate in a college with no fraternities, a right which they believed conflicted with the right to belong to Lambda Chi.¹³⁴ One student wrote:

As a woman of the Class of 1990 I am extremely bothered by the continued existence and activity of these illegal organizations. I chose to attend Colby four years ago in part because of the decision to ban fraternities from this campus. I did not want to enter a social and academic atmosphere dominated by discriminatory and frequently obnoxious organizations.¹³⁵

In the civil libertarian view, those who assert conflicting interests in associating without fraternities, based on concerns about harm caused by fraternities, are confusing speech and action. According to the MCLU, the students who oppose fraternities will not be significantly harmed by the mere existence of fraternities—only by fraternity behavior, which the college would remain free to punish. The MCLU explained that if it protects male students' right to join fraternities, "Colby may continue to advertise its anti-fraternity philosophy and attract students who wish to attend a college espousing this philosophy."¹³⁶

The MCLU's Brief assures us that the fraternity's "associational activities" which the college wishes to ban "are harmless and can be

132. See Reply Brief of Plaintiffs-Appellants, at 1 n.1, *Phelps v. President & Trustees of Colby College*, 595 A.2d 403 (No. AND-90-511). And in Senator Cohen's version of the Thomas hearings, presumably we are supposed to expect that the defense of the accused's right to be confirmed to the nation's highest court unless proven unfit beyond a reasonable doubt will similarly protect the rights of women to be presumed fit for the jobs we seek unless proven otherwise beyond a reasonable doubt.

133. "Those who share the dual goals of promoting racial equality and protecting free speech must concentrate on countering racial discrimination, rather than on defining the particular narrow subset of racist slurs that constitutionally might be regulable." Strossen, *A Modest Proposal?*, *supra* note 71, at 550.

134. *Most Letters to President Cotter Urge College to Take a Firm Stand*, COLBY CURRENTS, Summer 1990, at 6-7.

135. *Id.* at 6. Excerpts from statements submitted by other students similarly emphasize that this choice to associate in a college without fraternities was not a trivial concern: "One of my reasons for coming to Colby is because I was told that there were not fraternities here. As I have found out, that is a lie. . . . I wouldn't have come here had I known about the fraternities." *Id.*

136. Reply Brief of Plaintiffs-Appellants, at 32, *Phelps v. President & Trustees of Colby College*, 595 A.2d 403 (No. AND-90-511).

separated easily from other activities, such as hazing, harassment, or alcohol abuse, which may be harmful to others."¹³⁷ "[The Lambda Chis'] crime seems to have been simply that they formed their own organization with a Greek name. So the MCLU is not defending any action the students took, but their constitutional right to freedom of association—one of the most fundamental rights that Americans enjoy."¹³⁸

But the reliance on neutral principles to separate "mere association" from behavior ignores that the concepts of speech and behavior, and the line between the two, are socially constructed. Actions can be expressive; expression can have actual impact. Which side of the line is called speech and which is called action necessarily depends on experiential judgments about reality, not just logical deductions from principles. And the staunchest defenders of absolute speech rights are as likely as any others to privilege their own perceptions of whose speech is an absolute right of expression and whose speech can be restricted as harmful action.

B. *Speaking of Oppressive Action*

The line between speech and action is the subject of current debate in a case to be decided this year by the U.S. Supreme Court. In *R.A.V. v. City of St. Paul*,¹³⁹ a white youth was prosecuted under a local bias crime law for allegedly burning a cross one night in the yard of a black family two weeks after it moved into the previously all-white neighborhood.¹⁴⁰ The ACLU argued that the First Amendment prohibits St. Paul's ordinance banning cross burning and similar symbols known to arouse "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender . . ."¹⁴¹ The ACLU acknowledged that the First Amendment does not protect all symbolic expressions of hate, but it argued that this ordinance should be overturned and rewritten—not simply narrowly construed.¹⁴²

137. Brief *Amicus Curiae* of Maine Civil Liberties Union at 4-5, *Phelps v. President & Trustees of Colby College*, 595 A.2d 403 (No. AND-90-511).

138. Letter to the editor from Sally Sutton, MCLU Executive Director, *ME TIMES*, July 27, 1990, at 13.

139. *In re R.A.V.*, 464 N.W.2d 507 (Minn. 1991), cert. granted sub nom. *R.A.V. v. City of St. Paul*, 111 S. Ct. 2795 (1991). This case was decided June 22, 1992. The ordinance was held facially invalid under the First Amendment. 60 U.S.L.W. 4667 (U.S. June 23, 1992).

140. Tamar Lewin, *Cross-burning Case Tests Minnesota Hate Crime Law*, *ME SUNDAY TELEGRAM*, Dec. 1, 1991, at 1, 16A.

141. Brief *Amicus Curiae* of the American Civil Liberties Union, *In re R.A.V.*, 464 N.W.2d 507 (Minn. 1991), cert. granted sub nom. *R.A.V. v. City of St. Paul*, 111 S. Ct. 2795 (1991). See ST. PAUL, MINN., LEGISLATIVE CODE AND ADMINISTRATIVE CODE, ch. 292, § 292.02 (1990).

142. See Brief *Amicus Curiae* of the American Civil Liberties Union, *In re R.A.V.*, 464 N.W.2d 507 (Minn. 1991), cert. granted sub nom. *R.A.V. v. City of St. Paul*, 111

Counsel for the youth condemned the ordinance as a misguided attempt to "legislate social tolerance" and "enforce a notion of civility to the point of forbidding unpopular minority expression."¹⁴³ In contrast, groups supporting the ordinance argued that "[n]either the purpose nor the effect of cross burning is to engage in lively debate: it is and has been to terrorize, to intimidate and to spark violence, even murder."¹⁴⁴ "Not all disruptive or controversial speech . . . is steeped in [a] centuries-long tradition of violent attacks."¹⁴⁵

In an amicus brief on behalf of the National Black Women's Health Project, Catharine MacKinnon notes case law recognizing the active harm caused by symbolic expression in the context of race discrimination.¹⁴⁶ She argues that cross burnings, like signs that say "whites only," are impermissible action—not protected speech.¹⁴⁷ "Cowering in terror at night with your family on the floor of your own home in the light of a terrorist cross burning on your lawn is surely a deprivation of personal dignity equal to not being permitted to stay overnight in a motel on the road."¹⁴⁸

S. Ct. 2795 (1991).

143. Brief for Petitioner, *In re R.A.V.*, 464 N.W.2d 507 (Minn. 1991), *cert. granted sub nom. R.A.V. v. City of St. Paul*, 111 S. Ct. 2795 (1991), available in LEXIS, at 16, 22.

144. Brief *Amicus Curiae* in Support of Respondent Submitted by the Center for Democratic Renewal, The Center for Constitutional Rights, the National Conference of Black Lawyers, the National Council of La Raza, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America-UAW, The Young Women's Christian Association of the U.S.A., the National Organization of Black Law Enforcement Executives, the National Lawyers Guild, the United Church of Christ Commission for Racial Justice, the National Institute Against Prejudice and Violence, the Greater Boston Civil Rights Coalition and the National Coalition of Black Lesbians and Gays at 29-30, *R.A.V. v. City of St. Paul*, 111 S. Ct. 2795 (1991) (No. 90-7675) [hereinafter CCR *Amicus* Brief].

145. *Id.* at 41.

It is a manifest distortion of reality to claim there is an undifferentiated slippery slope leading from the midnight cross burning trespasser, to the speaker on communism or lesbian rights who offends and angers those who oppose those views. Only the former acts, within a contextual history of violent attack, to subject a group of people to terror and utilizes a symbol which has been the prelude to widespread and severe violence.

Id. at 41-42.

146. Brief *Amicus Curiae* of the National Black Women's Health Project in Support of Respondent at 16, *R.A.V. v. City of St. Paul*, 111 S. Ct. 2795 (1991) (No. 90-7675).

147. *Id.* at 21. "A crossburning is not a dialogue, it is a discriminatory act," despite its "expressive" message. *Id.* at 21. "[T]he harm of segregation and other racist practices is at least as much what it says as what it does, just as with crossburning, what it says is indistinguishable from what it does." *Id.* at 16.

148. *Id.* at 9. MacKinnon argues that

the practices prohibited by [the ordinance] form integral links in systematic social discrimination. They work to keep target groups in socially isolated, stigmatized and disadvantaged positions through the promotion of fear, intolerance, segregation, exclusion, disparagement, vilification, degradation,

Established law has recognized harm from expression in a number of contexts without protest from defenders of civil liberties.¹⁴⁹ Intimidation by threats of physical violence is not protected by the First Amendment.¹⁵⁰ Even the harmful impact of "mere association" is now well-established in race and sex discrimination cases.¹⁵¹

*Brown v. Board of Education*¹⁵² established that the harm of segregation was not simply the act of separating children by race, but the message—black inferiority—expressed by this form of association viewed in the existing social context.¹⁵³ Yet at the time of *Brown*, prominent legal scholar Herbert Wechsler believed that decision's ban on racially segregated schools could not be defended by neutral principles.¹⁵⁴ Such a position is a logical extension of an "absolute" defense of freedom of association rights. Like the Maine court in the Colby case, Wechsler found no way to resolve what he perceived to be an agonizing constitutional puzzle between associational rights: whites' free association right to associate in schools without blacks, versus others' right to associate in integrated schools.¹⁵⁵ Wechsler recognized that *Brown's* result required the

violence, and genocide. The harms range from immediate psychic wounding and attack . . . to well-documented consequent physical aggression. . . . As terrorist acts of social subordination, they effectuate inequality through coercion, intimidation and harassment.

Id. at 12 (citations omitted). MacKinnon observes, "Living in a state of siege is not conducive to health." *Id.* at 3.

149. For example, the ACLU urged denial of tax benefits to racially discriminatory educational institutions against the University's First Amendment claims in a brief *amicus curiae* in *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). See Strossen, *A Modest Proposal?*, *supra* note 71, at 546-47.

150. Laws such as the St. Paul ordinance "cannot be said to 'legislate social intolerance' unless criminal statutes can be said to be similarly 'intolerant' of violence, assault, and murder." CCR *Amicus* Brief at 40, *R.A.V. v. City of St. Paul*, 111 S. Ct. 2795 (1991) (No. 90-7675). Speech can be restricted because of other harms, as well: for example, the law recognizes the harmful effects of child pornography, *New York v. Ferber*, 458 U.S. 747 (1982); and of sexual and racial harassment, *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486 (M.D. Fla. 1991); *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*, 543 F. Supp. 198, 219-20 (S.D. Tex. 1982); *Lac du Flambeau Indians v. Stop Treaty Abuse-Wis.*, 759 F. Supp. 1339, 1349, 1353 (W.D. Wis. 1991); *State v. Miller*, 398 S.E.2d 547, 553 (Ga. 1990).

151. Compare *Brown v. Board of Education*, 347 U.S. 483 (1954) *with Plessy v. Ferguson*, 163 U.S. 537 (1896).

152. 347 U.S. 483 (1954).

153. See Penelope Seator, *Judicial Indifference to Pornography's Harm. American Booksellers v. Hudnut*, 17 GOLDEN GATE U L REV 297, 318 (1987).

154. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959).

155. Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail? I should like to think there is, but I confess that I have not yet written the opinion.

Court to choose among rights based on perceptions and judgments about contextual, social impacts.

In contemporary legal circles, Wechsler's agony over *Brown* "now appears quite odd."¹⁵⁶ And the predominant civil libertarian view holds that the compelling interest in ending discrimination outweighs any conflicting First Amendment rights.¹⁵⁷ But the MCLU found no such compelling conflicting interest justifying Colby's ban on fraternity membership.

C. Fraternity Membership in Context

The question the MCLU asked in the Colby case was whether the "mere association" of Colby students as the Lambda Chi fraternity had an impact on others' rights sufficient to justify limits on the Lambda Chis' freedom of association. The MCLU used this question as an obvious end to the discussion. The MCLU assumed that any intimidation, harassment, and violence by Lambda Chi members was separable from membership in the group itself; presumably, such problems could not be a systemic and inherent characteristic of a predominantly white group of college men.

A more principled approach would have made the question the beginning of a careful exploration of the effects of Lambda Chi membership.¹⁵⁸ Just as some symbolic cross burnings constitute harmful action in the social context of white terrorism, some college fraternities can take on characteristics of harmful action in the social context of male violence in general, and fraternity violence in particular. Fraternities like Lambda Chi do not have a history of violence comparable to that of some white supremacist groups. But a credible claim can be made that a fraternity such as Lambda Chi is a group with a central purpose of fostering misogyny, and an actual practice of harassing and terrorizing women and other students. Such a group is particularly threatening in a social context of pervasive violence against women.

Violence against women by well-educated men is a common reality in the United States—not a far-fetched speculation or philosophical opinion.¹⁵⁹ One out of every four college women will be sexually

Id.

156. Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 618.

157. Reply Brief of Plaintiffs-Appellants at 15-16, *Phelps v. President & Trustees of Colby College* (No. AND-90-511).

158. Ann Scales urges us to challenge "conversation-stopping arguments" by making these "the beginning rather than the end of discussion." Ann Scales, *Feminist Legal Method: Not So Scary*, 2 U.C.L.A. WOMEN'S L.J. 1 (forthcoming 1992) (manuscript at 13, on file with author).

159. One study of college students reported that nearly half of over three thousand women surveyed had experienced some form of sexual coercion since the age of fourteen. SANDAY, *supra* note 42, at 23 (citing Mary P. Koss et al., *The Scope of*

assaulted on a college campus; 80% of these campus attackers are fellow students, and "the most likely location of the attack will be a dormitory room or a fraternity house."¹⁶⁰ One study reported that about 35% of college men said they would commit a rape if they knew there was no chance of being caught."¹⁶¹

Moreover, sexual assault by college men occurs in a larger social context of pervasive violence against women in the United States. Battering by violent partners is the single major reason for emergency medical treatment for women in the United States.¹⁶² Every 7.4 seconds, a woman in the United States is beaten by her male partner; every 6 minutes a woman is raped.¹⁶³ Research about crimes

Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students, 55 J. OF CONSULTING & CLINICAL PSYCH 162-70 (1987). See also Jane Caputi & Diana E.H. Russell, "Femicide". *Speaking the Unspeakable*, Ms., Sept.-Oct. 1990, at 34. WARSHAW, *supra* note 81, at 64 (41% of raped women expect to be raped again) (citing Ms. Foundation survey by Mary Koss of acquaintance rape at United States colleges in 1985).

Sexual harassment of women on United States campuses is commonplace: at several campuses that have studied the problem, the majority of women surveyed reported experiencing some form of sexual harassment. See Jean O'Gorman Hughes & Bernice R. Sandler, *Peer Harassment, Hassles for Women on Campus*, 2 (Sept. 1988) (report issued by the Project on the Status and Education of Women, available from Center for Women Policy Studies, 2000 P St., NW, Suite 508, Washington, D.C. 20036).

160. Kathleen Hirsch, *Fraternities of Fear: Gang Rape, Male Bonding, and the Silencing of Women*, Ms., Sept.-Oct. 1990, at 52; WARSHAW, *supra* note 81, at 2. For a summary of a number of studies showing substantial levels of violence against women by college men in the U.S., see WARSHAW, *supra* note 81, at 13-14.

161. Neil M. Malamuth, *Rape Proclivity Among Males*, 37 J. OF SOC. ISSUES 138 (1981).

Another study of college men indicated that 15% had sexual intercourse with a woman against her wishes, and more than 50% had sexually touched a woman against her wishes. WARSHAW, *supra* note 81, at 96-97 (citing Karen Rapaport & Barry R. Burkhart, *Personality and Attitudinal Characteristics of Sexually Coercive College Males*, 93 J. OF ABNORMAL PSYCH. 216 (1984)). In another study, more than 60% of undergraduate men agreed that "it would be exciting to use force to subdue a woman." WARSHAW, *supra* note 81, at 93 (citing Virginia Greendlinger & Donna Byrne, *Coercive Sexual Fantasies of College Men as Predictors of Self-Reported Likelihood to Rape and Overt Sexual Aggression*, 23 J. OF SEX RES. 1, 5 (1987)).

162. Michele Lang, *Professionals, Activists, Crows: The Family Violence Program at Boston University School of Medicine (Notes From the Field)*, 14 HARV WOMEN'S L.J. 222, 224 (1991) (Center for Disease Control, 1985). "Battering is the cause of 50% of the injuries brought to hospital emergency rooms." *Id.* at 224 n.7 (citing Evan Stark et al., *Wife Abuse in the Medical Setting: An Introduction for Health Personnel*, DOMESTIC VIOLENCE MONOGRAPH SERIES No. 7., (National Clearinghouse on Domestic Violence 1981)). Nonetheless, one study of a metropolitan emergency department found that only 5% of battered women seeking emergency services were identified as such in physicians' reports. Wendy G. Goldberg & Michael C. Tomlinovich, *Domestic Violence Victims in the Emergency Department: New Findings*, 251 J. OF AM. MED. ASSOC. 3259, 3263 (1984).

163. Lang, *supra* note 162, at 223 (citing Susan V. McLeer, M.D., *Spouse Abuse*, THE HANDBOOK OF MARITAL THERAPY (1981)). Another report presents slightly differ-

against women demonstrates that "we live in the midst of a reign of sexist terror."¹⁶⁴

The presumption that harmful individual actions can be neatly separated from associational expression rests on an individualistic view of the world that minimizes the role of social institutions (like fraternities) in shaping individual behavior. White male violence is not merely an accident of individual pathology. Studies of rapists and mass murderers indicate that many of these perpetrators fit common images of "regular guys."¹⁶⁵

The denial of the systematic, political nature of privileged male violence is part of the structure that perpetuates such violence.¹⁶⁶ By focusing the problem on individual misbehavior, the need for institutional changes is obscured and individual women are more likely to bear the primary burden of stopping the violence. The difficulties individual women face in reporting and redressing systematic male violence are compounded not only by outright terrorism¹⁶⁷ but also by the dominant presumption that white male violence is an inexplicable individual aberration,¹⁶⁸ while women's reports of such

ent, although equally horrifying statistics: every 18 seconds, a woman is beaten, and every 3 1/2 minutes, a woman is the victim of rape or attempted rape. *Women, Violence and the Law: Hearing Before the House Select Comm. on Children, Youth and Families*, 100th Cong., 1st Sess. 1 (1987).

164. Caputi & Russell, *supra* note 159, at 37.

165. WARSHAW, *supra* note 81, at 86 (citing study of self-disclosed rapists by Eugene Kanin, *Date Rape: Unofficial Criminals and Victims*, 9 VICTIMOLOGY: AN INT'L J. 95, 98 (1984)). See also David Moberg, *The Michigan Post Office Killings Were a Tragedy Waiting to Happen*, IN THESE TIMES, Nov. 27-Dec. 10, 1991, at 9 (quoting Northeastern University criminologist James A. Fox, an expert on mass murders, discussing difficulty of screening for mass murderers because many people fit the profile of the typical mass murderer).

166. When Marc Lepine murdered 14 women at the University of Montreal in 1989 he separated the women from the men in one classroom and shouted, "You're all fucking feminists" as he opened fire; nonetheless, media reports frequently denied the political nature of the murders. Caputi & Russell, *supra* note 159, at 34. In a more recent mass murder, women were reportedly singled out; the murderer had written a note describing his anger at the "abundance of evil women," saying, "I will no matter what prevail over the female vipers in those two rinky-dink towns in Texas." Tom Squitieri & Debbie Howlett, *Women Were 'Singled Out' in Rampage*, USA TODAY, Oct. 18-20, 1991, at 1A, 2A. But as with the Montreal murder, many media reports erased or downplayed the misogynist motivation for the Texas mass murder. See, e.g., Don Terry, *Texas Call Killer a Troubled Loner*, PORTLAND PRESS HERALD, Oct. 18, 1991, at 1.

167. A number of studies suggest that battered women risk facing increased violence from abusive partners when they attempt to leave abusive relationships. National Clearinghouse for the Defense of Battered Women, *Statistics on Separation Violence* (Summer 1991 Draft).

168. Comments on the recently publicized Dahmer sex murders demonstrate this mystification of white male violence. A *Newsweek* article reporting on the case cites criminologists studying serial killings in the United States; "Over the years, it's become clear that most offenders are white males, but there are no real theories as to why that is so." *The Secrets of Apt. 213: A Gruesome Find in Milwaukee Spotlights*

violence are an archetypal pattern of feminine fantasy.¹⁶⁹

D. Lambda Chi's Expressive Tradition

As a Colby student, I got the message of Lambda Chi's expressive activity loud and clear: women should be subordinate to men, and men should enforce our subordination with violence. The experiences of those victimized by privileged male violence suggest the difficulties in separating harm caused by individual behavior from harm caused by the "mere expression" of fraternity participation.

For groups who associate for oppressive purposes in a context of societal power, the act of association itself can work to threaten and control others in order to prevent the identification and punishment of harmful actions.¹⁷⁰ One study found that some fraternities systematically used their organizations to protect members from law enforcement investigations and from university disciplinary action.¹⁷¹

At the time of the college's decision to punish Lambda Chi members, students wrote to Colby officials that their fear of fraternity retribution prevented them from reporting fraternity-related problems on campus. From a senior man in April, 1990:

Fraternal activity at Colby is a form of perpetual social assault. I have had to deal with men, crying, exhausted, broken and confused

the Bizarre World of Serial Killers, NEWSWEEK, Aug. 4, 1991, 40, 41.

169. See, e.g., JEFFREY M. MASSON, *THE ASSAULT ON TRUTH: FREUD'S SUPPRESSION OF THE SEDUCTION THEORY* (1984) (basis of modern psychological theory is Freud's decision to attribute women's accounts of sexual abuse to fantasy rather than reality). Some recent examples of women's accounts of sexual abuse which have been attributed to individual fantasy or psychopathology include Anita Hill's testimony in the nomination hearings of Justice Clarence Thomas, and the victim's testimony in the widely publicized William Kennedy Smith rape trial. See also Patricia J. Williams' discussion of the Tawana Brawley case, *supra* note 89.

170. One student explained that fraternity control of the student disciplinary board prevented punishment of individual misbehavior by fraternity brothers. COLBY CURRENTS, Summer 1990, at 6.

I served on the Judicial Board my sophomore year and was incredibly frustrated by the fact that the board was infiltrated with fraternity members, and that whenever fraternity members came before the board, justice was never obtained As a first-year student, I resided in . . . the dormitory in which most of the Lambda Chi members resided. I found it an extremely unpleasant living experience as they were sexist, intimidating and amazingly self-centered. . . . Diplomacy has not worked, and I strongly feel that unequivocal action is necessitated. I would like to see all of the members of Lambda Chi expelled.

Id.

171. Martin & Hummer, *supra* note 75, at 457. This study found "numerous examples" of fraternity brothers lying to authorities to protect brothers. *Id.* at 464. In one 1988 fraternity house gang rape where a female student came close to being killed, all but one member of the fraternity held rank to thwart a criminal investigation. *Id.* at 459, 464.

who were afraid to continue with the fraternity, but more afraid to speak out against their 'brothers.' Threats against their person are both made and implied. Rooms are entered and thrown in disarray. Pledges are ordered out into the middle of the night to perform duties, chores or exercises. Social discrimination and humiliation are the norm. Women are also abused, denigrated and discriminated against.¹⁷²

From another April, 1990 student letter urging Colby's President Cotter to punish Lambda Chi membership: "The campus has lived under fear of retribution for six years. No one says anything because if you as the administration don't do your job [following through on the promise made to ban fraternities], we are the ones who live with the consequences."¹⁷³ From a dorm president: "[T]he student body as a whole is intimidated by them. (Last weekend) there were literally packs of drunk, belligerent [Lambda Chi Alphas] running around the campus looking for trouble."¹⁷⁴ From another student letter to Colby's President Cotter urging him to punish fraternity membership: "[D]uring my sophomore year, I saw two of my neighbors harassed because they refused to join the fraternity of which many of their teammates were a part."¹⁷⁵ A senior Colby student who worked as the head staffperson of one dorm explained her experiences with the supposedly "off-campus" activities of Lambda Chis (who, the MCLU claimed, were forced "to associate in secret out of fear" in the spring semester of 1990):¹⁷⁶

I am unable to express in this letter the frustration, anger and bitterness of [the dorm residents] as a result of LCA activities. . . . [T]hey ran up and down the halls and stairwells, screaming, pounding doors, showing no respect for myself or my staff in our attempts to quiet them down at [sic] from eleven at night until three or four in the morning which is when most pledging activity occurred. . . . [P]art of my job is to watch out for the well being of all [residents of her dormitory] . . . I was powerless to do anything about [the disturbances caused by Lambda Chi pledging]. . . . I was told I could come forward with names but the fear which existed with those who would have had to testify was so great that they refused to come forward.¹⁷⁷

The fear of speaking out against fraternity-related problems is not unusual—or irrational. In her study of fraternity gang rapes, Peggy

172. Colby and Fraternities: Where We Stand (August 1990), *supra* note 33, at 7-8.

173. COLBY CURRENTS, Apr. 1990, at 6.

174. Colby and Fraternities: Where We Stand (August 1990), *supra* note 33, at 8.

175. COLBY CURRENTS, *supra* note 173, at 7.

176. See Plaintiffs' Trial Brief, *Phelps v. President & Trustees of Colby College*, 595 A.2d 403 (No. CV-90-287), at 23.

177. Trial Record, *Phelps v. President & Trustees of Colby College*, No. CV-90-287 (Me. Super. Ct., Cum. Cty., Aug. 22, 1990). Defendant's Exhibit 6.

Reeves Sanday found that fraternities used harassment, intimidation, and even death threats against students who spoke out publicly against particular incidents of fraternity violence.¹⁷⁸ For example, a Colgate faculty member said that threats against those who publicly report fraternity violence there are "not uncommon": "One woman [at Colgate] got a rock thrown through her window."¹⁷⁹

Public criticism of Colby fraternities sparked personal harassment and threats by fraternities, not just lively discussion.¹⁸⁰ One example of the kind of event that made many Colby students afraid to speak out against fraternity violence occurred in 1983 when I was an alumna living near Colby. The college had disciplined several Colby fraternity brothers who confessed to an incident of sexual "misconduct" involving a young girl from the local town.¹⁸¹ The college took no stand against fraternity membership at that time, and even took pains to keep the punishment from appearing to be a condemnation of fraternities in general.

After the college imposed the discipline, a large poster appeared on the entrance of the brothers' fraternity house announcing death wishes for the college officials who had punished the students. The poster, which claimed to speak for the fraternity as a whole, further informed the college community that if it ever were to find out who

178. SANDAY, *supra* note 42, at 126.

179. *Id.* Prosecuting gang violence or harassment by organized groups such as fraternity members is difficult particularly because of the associational nature of the actions. "The 'bonds of brotherhood' dictate that even group members who regret the episode will support the group version of what happened when questioned by authorities. 'One of the ironies of group acquaintance rape is that the defense witnesses outnumber the complainant-victim.'" WARSHAW, *supra* note 81, at 103 (quoting Jerome H. Skolnick, a professor of law at the University of California at Berkeley).

180. In the early 1980s, one student who had participated in a group supporting the ban on fraternities, and who had published student newspaper articles discussing the issue, was subjected to fraternity men yelling her name along with remarks such as "show us your tits" when she walked by the Lambda Chi house.

181. According to the college's report of the incident, a gang of brothers looked on while one of the brothers had sex with a girl, possibly as young as 15, in an upstairs room of his fraternity house. The college called this incident "misconduct," not "rape" or "assault," because the college determined that the girl had consented to having sex. Telephone Conversation with Edward Hershey, Director of Communications, Colby College (Aug. 28, 1990) (information based on search of college records). It is not clear how the college determined that this "consent" was not coerced, given the young woman's situation, nor exactly how much of what went on she had fully consented to.

Four brothers were found guilty of breaking college disciplinary rules; one was suspended for a semester, one was suspended for a shorter period, and two were placed on "probation." *Id.* The fraternity house to which the brothers belonged was placed on "social probation" for the rest of the school year. *Id.* The college's "Fraternity Guidelines" (instituted in 1981 as an attempt to improve problems relating to fraternities) define social probation as a sanction that prohibits fraternities from official sponsorship of campus social events. *Fraternity Guidelines—Will They Work?*, THE COLBY ALUMNUS, Fall 1981, at 13, 15.

reported the incident, the brothers would "stab them with an icepick."¹⁸²

It would take considerable imagination to argue that protecting such expression will ensure that victims of fraternity violence are free to express their conflicting ideas. In addition to the use of violence and harassment against others who disagree with their associative values, the degree of internal intimidation and coercion that certain college fraternities exercise over members distinguishes these groups from many other associations. It appears that some Colby fraternities, including Lambda Chi, enforced what could be considered a form of simulated slavery on pledges, giving fraternities a particularly powerful organizational advantage over other groups on campus.¹⁸³

The choice of certain Colby men to associate as "Lambda Chis" is apparently made with an eye to the particular impact of that group identity. If the students' purpose in belonging to Lambda Chi and other exclusively male Greek organizations was merely to create an intimate family-like group of like-minded, same-gendered friends (as the MCLU argued) or even to devalue women and to encourage excessive drinking and displays of heterosexual prowess, they would be free to do so simply by calling their group by a new name and by separating it from any identification with the pledging and hazing activities that characterized the groups as fraternities.¹⁸⁴ That they

182. The poster was copied in a leaflet distributed in response to the incident by an anonymous group of students (writing that they were too afraid to sign their names), urging the college to take steps to prevent such incidents by sponsoring educational programs on sexual "misconduct." The full text of the poster reads:

We, the brothers of Tau Delta Phi, in the year nineteen hundred and Eighty Three Do hereby promise, that we will do our best to get drunk, cause as much trouble as possible, and basically make life for the 1700 other Fuckwads on this campus as miserable as possible. We will pray nightly that Janice [Dean of Students] will die of a painful vaginal disease, that our prudential committee will become paralyzed from the waist down, and that Earl Smith [Dean of the College] will get aids, 2 strokes and V.D. at the same time. And if we ever find out who went to Janice, we will stab them with an icepick.

Leaflet (with photocopy of poster, on file with author).

183. A common feature of some fraternity rituals appears to involve brothers ordering pledges to perform laborious, demeaning (and occasionally illegal) tasks for them, and to endure physical and psychological abuse. See Trial Record, *Phelps*, Defendant's Exhibit 6 (letter from dormitory staffperson explaining hazing activity she observed disrupting other students); Hokanson, *supra* note 31, at 18 (discussing how "slave labor" from pledges gave fraternities advantages in organizing campus social events). Although slavery is a form of association, few, if any, civil libertarians would argue that private persons have a free association right to "choose" to use slavery.

184. In fact, Colby's sororities seem to have disbanded at the time of the ban on Greek organizations because other campus groups, or new sorority-like gatherings, served their purposes equally well. See Hokanson, *supra* note 31, at 8-9. A name change alone would not have sufficed to distance the group from the policy against fraternity membership if the group used other means to identify itself with the for-

did not choose to do so suggests that the mere act of calling themselves Lambda Chis had an impact beyond the male friendship and masculinist ideas the members may have wished to express.¹⁸⁵

Indeed, Colby has not banned all-male groups, groups that wish to celebrate masculinity, nor groups that wish to discuss any of the particular political ideas held by Lambda Chis. Lambda Chi members are free to speak and associate as much as they want; Colby has simply banned their association as Lambda Chis. And this distinction on Colby's part has some rational basis: the link of current Lambda Chi members with the group's history of hazing, harassment, intimidation, and possible violence on campus is arguably what makes it particularly threatening to other students who wish to express opposing views.

A close look at the experiences of students at Colby, in the context of violence against women in the U.S., suggests that the mere act of belonging to Lambda Chi at Colby could be an act that serves to threaten others and severely impair their college education. Some students felt forced to move off campus because of fraternity harassment at Colby; a few may have dropped out of school altogether.¹⁸⁶ It is likely that many more withdrew socially, emotionally, and academically from college life.

Critics of Colby's position in the fraternity case argue correctly that Colby probably could have done a better job of seeking out and punishing individual incidents of violence and harassment by fraternity members over the years. But cross burnings also might not have developed into a threatening act in a society that had a better history of preventing and punishing racist violence.

It is true that harassment, rape, vandalism, gay-bashing, destructive drinking and other problems will probably exist at Colby with-

mer Greek-letter organization. See *id.*, *supra* note 31, at 20 (difficulty of distinguishing sports teams from fraternities). My argument is that this identity with the fraternities is what has a particularly harmful impact.

185. In addition to any impact resulting from identification with a reputation for possible hazing and harassment, another possible impact of the Lambda Chi name is financial—job contacts, alumni support, national legal backing.

186. I moved off campus in large part to avoid fraternity harassment. One male student on my first-year dormitory hall, from a rural area of Maine, was harassed by the fraternity pledges in my dorm; he did not pledge a fraternity and did not join in the dormitory pledging activities. He left school shortly after the Lambda Chi and KDR pledges moved his possessions into the hallway and barricaded him out of the room he shared with one of the pledges. To my knowledge (and regret) none of the rest of us on the hallway discussed this incident with college authorities. I have heard rumors of women at Colby who allegedly dropped out of college after being sexually assaulted or harassed by fraternity members.

A Colgate University student who pressed charges against two fraternity brothers for gang raping her in 1987 at a fraternity party left school for a time after being harassed by angry fraternity members. Hirsch, *supra* note 160, at 52, 55.

out Lambda Chi and other fraternities.¹⁸⁷ However, it also is probable that certain formally organized fraternities such as Lambda Chi directly affect the freedom of women and other non-fraternity members to associate safely and equally in the college community. A study of sexual assault at the University of Illinois at Urbana-Champaign found that fraternity men, who constituted one quarter of the male student population, perpetrated 63% of sexual assaults on campus.¹⁸⁸ A 1985 study by the Association of American Colleges' Project on the Status and Education of Women found more than 50 reported gang rapes on U.S. campuses, most of which occurred at fraternity parties, and determined that far more went unreported.¹⁸⁹

Even though it could be true that these fraternities disproportionately attract men who are otherwise disposed to violence, many fraternities explicitly develop or exacerbate sexually violent tendencies in men who might not engage in such actions without such formally organized peer encouragement.¹⁹⁰ One fraternity brother accused of

187. Bates College, another small liberal arts college in Maine, does not have fraternities, but is by no means free from such problems. See, e.g., Phyllis Austin, *Bates' Handling of Rape Charges Draws Criticism*, ME. TIMES, Jan. 24, 1992, at 11.

188. Hirsch, *supra* note 160 at 52.

189. WARSHAW, *supra* note 81, at 105 (citing JULIE K. EHRHART & BERNICE R. SANDLER, *CAMPUS GANG RAPE: PARTY GAMES?* (1985)). Warshaw discusses recent alleged fraternity gang rapes at San Diego State University, University of Florida, University of Pennsylvania, University of Iowa, University of New Hampshire, Franklin and Marshall College, and University of Virginia. WARSHAW, *supra* note 81, at 104-05.

190. In a 1980 letter to the college newspaper, a Colby classmate of mine described her perceptions of the effect of fraternity membership:

I lived in Dana my first year The men there were friendly, as confused as I was, and generally nice to have around . . . they were still fondly known as "the guys on the T."

That changed. At least for me it did. They all pledged fraternities (yes, I know, I'm being a trifle blunt) and I won't say that suddenly they were different, but there was a change, however gradual. There was a definite sense of the females on one side of a man's existence and "the men" on the other. . . .

The men ran our floor [sic]. They were blatantly cruel to people they didn't like, and come 'hell week' they took over the campus, playing capture the brother, displaying their masculinity all the more vehemently to make up for their lack of confidence in it, and there was nothing for the women to do but live with it and try to ignore it. The men all seemed like weak-kneed, insecure children who desperately needed something to give them an identity, for finding one inside themselves was beyond their capabilities. And there were the frats, ready and willing to pamper them, give them a name, tell them who they liked and disliked, and show them how to be men, unfortunately with the result that women were seen as tools with which to display manliness, as less than men, as an afterthought to the man's world, but not as comrades.

Letter to the editor from Rachel Lavengood, *Identity for the Feeble*, COLBY ECHO, Feb. 29, 1980, at 18. "The Guys on the T" responded with a letter that ended with some of the same harassment that she protested: "Back when we thought you were our 'friend' you were the 'tits.'" Letter to the editor from "The Guys of the T",

gang raping a female student explained that he joined in the assault because he had come to believe, through fraternity stories and fraternity pornography-viewing activities, that gang rapes were a normal and acceptable form of sexual expression.¹⁹¹

Anthropologist Peggy Reeves Sanday has analyzed the process by which some college fraternities socialize new members so that they believe heterosexual assault is normal, and indeed central, to male identity, and to disregard women's feelings of harm.

Whatever a young man's subjective or ethical position might be upon entering college, if he joins a fraternity he may experience during initiation or in house activities a radical alteration of consciousness that shapes his masculine subjectivity and attitudes toward women. In exchange for brotherhood and power some pledges are molded by the group mind of the fraternity that casts them in the role of "rowdy, misogynist male." . . . The misogyny evident in some fraternity group rituals raises the question of the legal status of groups of men on campus who train incoming students to demean and disparage their female peers, attitudes that may well lead to breaking the law in cases of gang rape or date rape.¹⁹²

In a 1980 discussion of Colby fraternities' effects on women, one student said:

The individuals (in the fraternities) would probably never behave that way on their own. . . . [I]t seems to me that being a frat brother means that you can do violent things, or anti-social things, like treating women like dirt, and get away with it. Even be encouraged to do it.¹⁹³

Another student, who expressed her fear of the "horror stories" being told about fraternity parties and her self-consciousness from "being made to feel like a 'pick-up,'" explained that such behavior "doesn't necessarily happen only with frat men, but the frat system seems to legitimize these actions."¹⁹⁴

Runny Noses, COLBY ECHO, Apr. 11, 1980, at 22.

191. WARSHAW, *supra* note 81, at 109-10. "[Many] fraternities create a sociocultural context in which the use of coercion in sexual relations with women is normative and in which the mechanisms to keep this pattern of behavior in check are minimal at best and absent at worst." Martin & Hummer, *supra* note 75, at 459. See also Andrew Merton, *On Competition and Class: Return to Brotherhood*, Ms. Sept. 1985, at 60.

192. SANDAY, *supra* note 42, at 192. Sanday suggests that the existence of certain fraternities can create a situation of sex discrimination in education.

193. Yorks, *supra* note 75, at 7.

194. *Id.* This article found that the women interviewed were "reluctant" to discuss the details of any of the "horror stories" about fraternity treatment of women. *Id.*

Another 1980 student commentary that helped spark the debate that eventually led to Colby's decision to ban fraternities stated:

Inherent in the [fraternity] system is the inferior status of females, who are viewed as frivolous commodities. As long as this system dominates Colby's

Two sociologists studying fraternity-related rape concluded that fraternity violence against women will continue to be a problem without a fundamental change in the "composition, goals, structures, and practices" of the groups: "Encouraging renewed emphasis on their founding values . . . , service orientation and activities . . . , or members' moral development . . . will have little effect on fraternities' treatment of women. A case for or against fraternities cannot be made by studying individual members. The fraternity qua group and organization is at issue."¹⁹⁵

According to one study, cultural characteristics of fraternities that encourage violence against women "are found in fraternity houses from coast to coast."¹⁹⁶ In several cases, universities have found certain fraternities responsible as groups for organized, intentional, and persistent patterns of abusive behavior.¹⁹⁷ In fact, educational institutions that do *not* recognize and take steps to prevent such persistent patterns of abuse by student fraternal organizations may run the risk of being held liable for resulting harm—regardless of whether the fraternities characterize themselves as "unofficial" and "off-campus."¹⁹⁸

so called "alternative living," social atmosphere, and male-female role, the male dominant attitude, with all its abuses, will be perpetrated on this campus, as well as reflected by some of our graduates.

Whit Symmes & Dave Silk, *Beyond Fraternities*, COLBY ECHO, Feb. 14, 1980, at 22.

195. Martin & Hummer, *supra* note 75, at 471.

196. WARSHAW, *supra* note 81, at 106. These cultural characteristics include language that dehumanizes women and glorifies sexual assault and rituals that simulate and reward sexual assault. *Id.* at 106-09.

By suggesting that these characteristics are not unusual among fraternities, I do not mean to argue that *all* fraternities are characterized by violence or harassment or that all fraternities are a civil rights problem. Yet in supporting and celebrating exclusion of women, exclusively male fraternities that are not explicitly committed to redressing the problems of male power over women are likely to contribute to the social marginalization of women. "There are different Klans—just like there's [sic] different fraternities at a college," insists former Louisiana State Representative (and presidential candidate) David Duke. NEWSWEEK, Sept. 30, 1990, at 15.

197. WARSHAW, *supra* note 81, at 106. Although the market is by no means free from problems of biased perception, it does recognize an economic impact from "mere association" in the case of college fraternities: "[F]raternities 'are the third riskiest property to insure behind toxic waste dumps and amusement parks.'" Martin & Hummer, *supra* note 75, at 465 (quoting university officials).

198. See Eugene D. Gulland & Marjorie E. Powell, *Colleges, Fraternities and Sororities: A White Paper on Tort Liability*, 17-18, 25-29 (May 1989) (unpublished manuscript available from American Council on Education). Schools may be liable under negligence theories for failure to respond adequately to repeated assaults. See, e.g., *Peterson v. San Francisco Comm. Coll. Dist.*, 685 P.2d 1193 (Cal. 1984).

Students harmed by a school's failure to address problems of persistent sexual harassment or sexual assault from fraternities might be successful in winning damages on the grounds of sex discrimination. See *Franklin v. Gwinnett Cty. Pub. Sch.*, 60 U.S.L.W. 4167 (U.S. Feb. 26, 1992) (Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, allows a damage remedy for student claiming sexual

The history and continuing practice of intimidation and hate by Lambda Chi, combined with a social context that both sanctions and denies privileged male violence, provides a principled basis for distinguishing Colby's ban on fraternity membership from a similar ban on other unofficial student groups—a student social club limited to lesbians and gay men, for instance, or a group limited to African-American students.

Civil libertarians are entirely right that such attempts at making contextual distinctions are dangerous. Members of another "underground" Colby fraternity (which disbanded after pledges were caught stealing from local townspeople as part of an initiation ritual) turned the comparison on its head to tell a tale of heterosexual men as primary victims of oppression: "The administration is on a 'witch hunt' one of the students said, at which point another student chimed in and said 'If we were a bunch of gays [instead of fraternity members], we could do anything we wanted.'"¹⁹⁹ It is important that hurt feelings from loss of privilege, and expression that simply challenges values and beliefs, be distinguished from fears of harm based on a social reality and historical context of violent oppression.²⁰⁰

VIII. TRICKLE-DOWN LIBERTIES

The abuse is permitted, but resisting it is not.

—Catharine A. MacKinnon²⁰¹

Civil liberties advocates wisely warn that laws that permit recognition of the harmful impact of certain forms of expression or association will be used to repress legitimate speech by oppressed groups. The ACLU hopes to guard against the dangers of exaggerated perceptions of the harms of subversive speech by sticking steadfastly to broad, unbendable free speech principles.²⁰² When

harassment).

199. Hokanson, *supra* note 31, at 14 n.44 (interviewing two male Colby seniors, former members of Zeta Psi, Apr. 15, 1989).

200. Patricia Williams comments on the tendency for the wounded egos of those in power to outweigh threats to human lives in her story about city officials who, when publicly questioned about the police killing of a sixty-seven-year-old black woman during an eviction proceeding, protested that this public attention hurt their feelings. Patricia J. Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law's Response to Racism*, 42 U MIAMI L REV 127, 135 (1987). "Trying to hold a public official accountable while not hurting his feelings is a skill the acquisition of which would consume time better spent on almost any conceivable task." *Id.*

201. MacKinnon, *supra* note 8, at 12.

202. History demonstrates that if the freedom of speech is weakened for one person, group, or message, then it is no longer there for others. The free speech victories that civil libertarians have won in the context of defending the right to express racist and other anti-civil libertarian messages have

speech is used by subordinate groups to protest abuses of majority power, all those lawsuits on behalf of the Nazis and the Klan are supposed to pay off: the principles established on behalf of oppressors should be there for those whose speech traditionally has been suppressed.²⁰³

The opposite result is just as likely. This trickle-down theory of freedom of speech fails to understand that principles are inevitably shaped by perceptions. The principle of free speech necessarily requires a determination of what constitutes merely "subjectively" offensive speech, and what constitutes "objectively" harmful action.

If the perception of the harm defines the principle, we are left exposed to the biased perceptions evident in the Colby case and the Thomas hearings—biases that are likely to define discriminatory action as free speech, and to define expressions of resistance as harmful action. The many established exceptions and limits to free speech frequently are not applied equally. Limitations on speech that are construed as ambiguous and risky when used to restrict privileged speech are often accepted as obvious, well-established, and necessary when used to restrict traditionally suppressed speech.

One month after it decided the fraternity case, Maine's highest court decided another case about the boundaries of free speech at Colby College. *Lester v. Powers* involved a letter written by a former Colby student in response to a college committee's solicitation of student comments about a psychology professor then being considered for tenure.²⁰⁴ In this letter, a recent Colby graduate expressed her opinion that Professor Lewis Lester created a teaching atmosphere that was homophobic,²⁰⁵ and that as a result of his alleged homophobia she felt uncomfortable and intimidated in his classes.²⁰⁶

When the professor was denied tenure, he sued this former student on the ground that she had defamed him by stating that she

been used to protect speech proclaiming anti-racist and pro-civil libertarian messages.

Strossen, *A Modest Proposal?*, *supra* note 71, at 536-37 (footnote omitted).

203. Explaining the ACLU's defense of Nazis and the Klan, General Counsel Nadine Strossen states:

In the recent past, the ACLU has handled about six cases a year advocating the free speech rights of white supremacists, out of a total of more than six thousand cases, and these white supremacist cases rarely consume significant resources. Moreover, the resources the ACLU does expend to protect hatemongers' first amendment rights are well-invested. They ultimately preserve not only civil liberties, but also our democratic system, for the benefit of all.

Id. at 550 (footnotes omitted).

204. 596 A.2d 65, 67 (Me. 1991).

205. *Lester v. Powers*, No. CV-88-63 (Me. Super. Ct., Ken. Cty., Sept. 25, 1990) at 2, *affirmed by Lester v. Powers*, 596 A.2d 65 (Me. 1991).

206. *Lester v. Powers*, 596 A.2d at 67.

believed he was homophobic.²⁰⁷ In a thoughtful opinion discussing the free speech problems posed by this claim, Superior Court Justice Donald Alexander (the same judge who decided *Phelps*, the fraternity case) granted the former student's motion for summary judgment.²⁰⁸ The Law Court affirmed, reasoning that such comments were protected by a conditional privilege.²⁰⁹

The MCLU's interest in students' freedom of speech at Colby College apparently did not extend to this case: it did not volunteer to defend the alumna's free speech rights, nor did it take a public position on the case. Interestingly, the attorney for the plaintiff professor in this case was one of the volunteer attorneys bringing the MCLU suit on behalf of the Lambda Chis' free speech rights.²¹⁰

Despite assurances that the defense of Colby's banned fraternities will establish similar rights for banned gay and lesbian groups, a glance at the news finds civil libertarians on the other side. In a recent dispute about the right of St. Patrick's Day parade organizers in New York City to exclude a gay and lesbian group, the New York Civil Liberties Union argued that the free association right of private institutions to exclude those with whom they disagree is fundamental to civil liberties.²¹¹

Even worse than the uneven defense of free speech rights is the tendency to condemn efforts to remove traditional barriers to free speech as an attack on free speech.²¹² The MCLU defended what

207. *Lester v. Powers*, No. CV-88-63 (Me. Super. Ct., Ken. Cty., Sept. 25, 1990). The names of students writing to the tenure committee are confidential; this case did not determine how this particular student's identity was revealed to the plaintiff. See *Lester v. Powers*, 596 A.2d at 67 n.2.

208. *Lester v. Powers*, No. CV-88-63 (Me. Super. Ct., Ken. Cty., Sept. 25, 1990).

209. *Lester v. Powers*, 596 A.2d at 70-72.

210. See *id.* at 66; Brief of Plaintiffs-Appellants, *Phelps v. President & Trustees of Colby College*, 595 A.2d 403 (No. AND-90-511). Of course, since traditional legal culture encourages attorneys to disregard their personal principles in their professional work, attorneys should not be presumed to personally support the principles they argue on behalf of their clients.

211. *Civil Liberties Union Supports Hibernians*, NY TIMES, Mar. 5, 1992 at B3 (late edition).

212. A protest against a film called "Wanda Whips Wall Street," shown at Yale Law School in 1987, presents one example of how potentially resisting speech is at risk of being condemned as "threatening action" in the name of a strict defense of free speech principles. Leaders of the law school women's group responded to complaints about the film by arranging showings of a film about the harms of pornography and by organizing a protest. A group of 20 to 30 students, two professors, and the law school dean stood silently holding signs saying such things as "Pornography Degrades Women" near the entrance of the auditorium where the film was shown.

A professor criticized the protest, particularly the dean's involvement, as a threat to free speech. Letter from a professor to Guido Calebresi, Dean of Yale Law School (Sept. 24, 1987) (on file with author). He argued that such protests aimed "not only at rational persuasion but also psychological coercion, and that is especially dangerous in a community that wishes to encourage controversy." He warned that the protest might be "frightening and cowing" to other students and would be "likely to

arguably was Lambda Chi's history of forcing its views on the rest of the campus as a long tradition of free expression. The MCLU then denounced Colby's recent attempt to prevent the fraternities' views from dominating the campus as intolerant coercion and intimidation of those who are not "politically correct."²¹³

MacKinnon describes how "pornography's actions are protected as speech, but our speech against it is silenced as action."²¹⁴ Similarly, discussion of the reasons for Colby's ban on fraternities was sometimes criticized as threatening action, not defended as free speech. After a public radio station had aired several stories about the Colby case stressing Colby's threat to fraternity members' free speech rights, I presented a commentary describing how fraternity activity had threatened other students' free speech rights.²¹⁵

I was at first told by radio officials that, because of their concerns about libel, I could not speak on the air about specific incidents of fraternity violence against women unless I had proof that the fraternity members involved had been criminally convicted for these incidents.²¹⁶ This rule effectively barred the content of my speech, since

intimidate others who wish to view the film and arrive at their own judgments."

Despite agreement on principle, perceptions differed sharply about whose speech posed a danger of becoming intimidating and silencing action. Students participating in the protest described the harassment and threats they received from a crowd of hundreds, mostly men, many of whom were drunk. For example, in one incident, "[a]t least eight men came wearing trenchcoats, apparently with nothing on underneath. They were greeted with cheers of raucous appreciation. At one point these men surrounded three women YLS protestors and shouted repeatedly, 'Are you ready? Are you ready? We're ready! We're ready!'" Protesting students described their experiences:

Many of us who were there [protesting] felt extremely frightened. Many were sickened by what we had seen. Between shows some huddled in the hall and on the stairs, hugging each other. One woman—a former victim of a sexual attack—cried. Another was sick. The Dean walked around and talked with us, sometimes saying, "Courage."

An Open Letter for the Law School Community, signed by Eileen Hershenov and 17 other students (Oct. 2, 1987).

213. I believe that a ban on fraternities when I was a Colby student would have promoted freedom of expression on campus. *Cf.* Sunstein, *supra* note 156, at 618-24 (restrictions on pornography may be a defensible means of promoting freedom of speech within conventional First Amendment doctrine); *see generally* Owen Fiss, *Free Speech and Social Structure*, 71 *Iowa L. Rev.* 1405 (1986) (restrictions on some expression can promote freedom of speech).

214. MacKinnon, *supra* note 8, at 11.

In this system of inequality, a woman's first obligation is silence. Incest and child sexual abuse is not taboo. Exposing it is. Pornography is not forbidden. Saying what it does, is. . . . Because the voice of reality is silent here, no one knows what is happening to women, and so whenever it happens to you, it looks exceptional and it feels exceptional.

Id. at 12.

215. I supported my allegations with documentation from college records, but deleted references to specific fraternities or individuals.

216. Attempts to report sexual harassment and rape may be deterred by threats

the point I was trying to make was that certain fraternities generally were not criminally convicted for abusive actions because they successfully used terrorism to thwart reporting.²¹⁷ The radio station finally aired my commentary, but insisted that I delete references to the sexual nature of an alleged incident of fraternity misbehavior.

IX. CIVIL RIGHTS: IN WHOSE CONTEXT?

The saga of Colby's Lambda Chis encapsulates a crisis of contemporary legal theory. Persistent prejudice and brutal oppression coexist in harmony with noble civil liberties principles. "Neutral" rules offer little help in resolving inevitable conflicts in perception (like the Thomas hearings) where what some perceive as preposterous fiction strikes others as obvious truth.

In most public accounts of the Colby case, the harm to others from "mere membership" in college fraternities was virtually unimaginable, while the harm to fraternity members from banning fraternal association was disturbingly clear. I have tried to show how the opposite can be a plausible view of reality: that significant harm from participation in some fraternities is a serious possibility and frequent reality, while the harm to students' expressive freedom that might result from denying fraternity membership at some private colleges is minimal. A credible claim might even have been made under the Maine Civil Rights Act against certain fraternities for interference with civil rights by threat, intimidation and coercion.

In the Colby case, both the MCLU and the Maine court that ruled against it rejected the consciously contextualized approach to legal reasoning that has become increasingly familiar in contemporary jurisprudence.²¹⁸ Both feared the results of allowing courts to evaluate the actual harm to civil rights resulting from private expressions in particular situations, opting instead for an illusion of unyielding principles: the MCLU insisting that private association is an indivisible civil right; the courts insisting that courts cannot evaluate conflicting private rights—even though they daily do exactly that in virtually every area of the law.

In a postscript on the Colby fraternity case, a new version of the Maine Civil Rights Act (enacted in 1992) attempts to resolve some of the problems raised by *Phelps*.²¹⁹ An amendment to the Act ex-

of defamation actions. A study of acquaintance rape describes one woman who was threatened with a lawsuit after she reported an alleged rape to the police. WARSHAW, *supra* note 81, at 91.

217. I contemplated approaching the MCLU for help in bringing a claim of interference by the public media with my free speech rights.

218. See *Symposium*, *supra* note 91.

219. P.L. 1992, ch. 821. This amendment was based on a bill submitted by the Maine Department of Attorney General.

plicitly allows claims against private parties (such as hate groups) for interference with constitutional rights—overturning *Phelps's* narrow definition of “rights secured by the constitution.”²²⁰ In addition, the new version of the Act restricts actionable claims to those in which the interference with civil rights is accomplished by “physical force or violence or the threat of physical force or violence.”²²¹ The MCLU unsuccessfully lobbied against this limitation as “arbitrary and unprincipled.”²²²

The new limiting language attempts to clarify that the Act aims to remedy harmful action (physical force, violence, or threats of physical force or violence), and that it does not intend to restrict otherwise protected private speech—such as Colby's exercise of its own right to ban fraternities. This amendment will not absolve courts from drawing difficult lines nor from choosing among perceptions. Disagreement may persist about whether Colby's ban on fraternities is “brute force” or free association, or whether a particular cross burning is “philosophical disagreement” or a threat of violence. But a debate about what kinds of expression constitute violent or threatening action, in what circumstances, is likely to be more fruitful than a debate about defending “absolute” principles of free speech.

Insistence on the inviolability of unadulterated²²³ free speech rights obscures the fact that any principle is limited, indeed defined, by its boundaries. The conversation should be about where the boundaries are, and about whose perceptions and stories shape those boundaries, rather than about whether there should be any boundaries at all. Denying the inevitable boundaries to expressive rights privileges the status quo, where the limits generally have been designed in the interests of those who historically have been most powerful.

In the current period of anti-civil rights backlash, open debate about the perceptions that divide free speech from costly action is particularly urgent. Despite reverence for the principles of *Brown v.*

220. The new law enacts ME. REV. STAT. ANN. tit. 5 § 4684 to read:

For the purposes of this chapter . . . rights secured by the Constitution of the United States and the laws of the United States and by the Constitution of Maine and the laws of the State include rights that would be protected from interference by governmental actors regardless of whether the specific interference complained of is performed or attempted by private parties.

P.L. 1992, ch. 821, § 3.

221. P.L. 1992, ch. 821, §§ 1 & 2 (to be codified at ME. REV. STAT. ANN. tit. 5 §§ 4681, 4682).

222. Written statement of Sally Sutton, MCLU Executive Director, on L.D. 2318, submitted to the 115th Maine Legislature's Joint Standing Committee on the Judiciary, Mar. 4, 1992.

223. See Berner, *supra* note 73, at 4. Note that sexual imagery is commonly used in discussions of free speech principles.

Board of Education,²²⁴ it may be becoming less “odd” for liberals to use free speech claims to challenge antidiscrimination efforts. For example, in defending Stroh’s Brewing Company’s right to express its views of women through advertising regardless of any discriminatory impact on its workplace, the ACLU’s Executive Director presumes without discussion that *his* distinction between speech and conduct is the right one.²²⁵

Legal analysis that promotes stories of pure principles separate from personal and political contexts serves to legitimize, not challenge, the dominant context of pervasive denial of oppression. In contrast, feminist method demands personal responsibility for principled positions, opening up legal reasoning to scrutiny of personal emotional commitments. And rather than replacing rational principles with personal whims, feminist method can serve to foster rigorous analysis of the socially constructed presumptions that shape individual perceptions.

Attempts to proclaim neutral principles beyond debate (or to abstain from realism in postmodern debate) will not prevent personal experiences from masquerading as universal reality. The concepts of “free speech” and “harmful conduct” and even “violence” are to some extent malleable, subjective, and indeterminate. But those who use law in the intractably real world in the hope of making both better should struggle to debate—and redefine—these complicated and dangerous categories, and not avoid their difficulties.

224. 347 U.S. 483 (1954).

225. “The reason we make a distinction in this country between speech and conduct is so we can avoid a situation where the government gets the power to decide which speech is acceptable, while still retaining that power to punish illegal conduct. That is the right distinction.” Letter from Ira Glasser, ACLU Executive Director, *Censorship and Advertising*, LOS ANGELES TIMES, Dec. 11, 1991, at 6B (arguing that ads are unregulatable speech, not discriminatory conduct). I assume that Glasser would place “whites only” employment advertising on the side of conduct, not speech, but I’m not as confident as he is about the government’s line-drawing abilities.

In another example, the Florida branch of the American Civil Liberties Union is using free speech grounds to appeal *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486 (M.D. Fla. 1991), which found that pervasive pornography in the workplace contributed to an environment of sexual harassment. Suzanne Fields, *Ongoing Gender Furies*, WASHINGTON TIMES, Nov. 18, 1991, at E3.

