

A Feminist Re-Consideration of the Legal Regulation of Speech

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Abstract

This thesis presents a gendered re-consideration of free speech, including certain laws of the United States and Britain that regulate speech. Among these are laws regarding obscenity and the torts of defamation and invasion of privacy, along with other ways in which the law may respond to sexually hateful speech, including the law on sexual harassment in the work-place and various U.S. constitutional doctrines and English laws relevant to so-called hate speech.

This analysis operates on both theoretical and practical levels. On the theoretical plane, it questions, for example, whether the right to free speech can ever be as useful or meaningful to women as it is to men in the absence of actual equality of sexes. The initial feminist critique of the free speech principle, which is reviewed here, was situated in the discussion of obscenity law, revealing in particular that legal debate's failure to consider the harms that pornography may cause women. The critique of obscenity provides useful background for the remainder of the thesis, which goes beyond the obscenity context to discuss other types of sexually hateful speech. This thesis questions whether U.S. and English laws effectively and appropriately respond to sexually hateful speech, and it considers various issues peculiar to this debate.

Finally, this thesis draws on these debates from the obscenity and hate speech contexts in considering, through a gendered lens, torts that provide redress for communicative injuries. This analysis of the torts of defamation and invasion of privacy reveals certain gender-related assumptions that underlay their adoption and development. Gender factors that may affect the outcome of such tort claims are also discussed. Finally, this thesis considers whether these torts, or other laws, effectively redress the types of communicative injuries women typically suffer.

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Introduction

[T]he knowledge which men acquire of women, even as they have been and are, without reference to what they might be, is wretchedly imperfect and superficial, and always will be so until women themselves have told all that they have to tell.
Harriet Taylor¹

When a subject is highly controversial--and any question about sex is that--one cannot hope to tell the truth. One can only show how one came to hold whatever opinion one does hold. One can only give one's audience the chances of drawing their own conclusions as they observe the limitations, the prejudices, the idiosyncracies of the speaker.

Virginia Woolf
A ROOM OF ONE'S OWN (1929)

[S]tories cause people "to think freshly." They "draw our attention" and "cause us to arrest the ready reaction." They can "shake up some assumptions" and "deprive [the present] of peace of mind." Given this disturbing quality, storytelling has much to offer those who are committed to reasoning from principles. Far from being a substitute for it, storytelling provides a means of interrogating the reasoning process. Moreover it provides an occasion for considering which principles should guide us and a way of discovering how the prevailing principles came to be.

Harlan L. Dalton²

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¹ HARRIET TAYLOR, *THE SUBJECTION OF WOMEN* 26 (1970) (first published by John S. Mill in 1869). This attribution is a disputed one. Mainstream scholars attribute this work to John S. Mill, contending that Harriet Taylor assisted only with the editing. Many feminist scholars maintain joint authorship or alternatively, singular authorship with only Taylor given credit. See Kathleen Lahey, ". . . *Until Women Themselves Have Told All That They Have to Tell* . . .", 23 *Osgoode Hall L.J.* 519 (1985).

² Harlan L. Dalton, *Storytelling on Its Own Terms*, 58 (quoting Martha Minow) in *LAW'S STORIES: NARRATIVE AND RHETORIC IN LAW* (Peter Brooks and Paul Gewirtz eds. 1996).

And so a story . . . In the spring of 1988, a woman is elected editor-in-chief ("EIC") of the law journal of a state university's law school, only the second woman in the 40-something year history of the law review to hold that prestigious position. On the day of the election, two men put up a small poster in the law review office. In the form of an election ballot, the poster features listings of candidates for three positions: "Law Review Chief Coffee Maker," "Law Review Chief Head Giver" and "Head Slut." Several women law review members' names, including that of the new editor-in-chief, are listed as "candidates" for each of the first two positions; for the third, "Head Slut," the new editor is the only listed candidate. She removes the poster without comment. The following day, when the woman enters the law review office, one of the men responsible for the poster approaches her and announces, in a mocking tone and in the presence of others, "you won't serve out the year as editor-in-chief because we're going to make your life hell." The woman responds by declaring to those in the law review office that the poster was unacceptable and that it, the man's comments, and the sort of low-level sexual harassment to which women in the law review office had been exposed will no longer be tolerated. She leaves the office in tears.

Word of the incident spreads like wildfire around the law school and is the subject of several letters (including one from the woman EIC in response to the initial salvo from a male law review member) to the law school newspaper; the poster incident is discussed at faculty meetings. There is no question as to the identity of the two men who were responsible for the poster; they admit putting up the poster, explaining that it was "just a joke." The law school administration does not publicly acknowledge the incident. The law school Dean never makes a public statement that such behavior is unacceptable; the culprits do not suffer any consequences for their actions; they are not even scolded.

Yet the woman is devastated by the event. She is unable to sleep. Previously an outgoing but (she thought) uncontroversial person, she had not realized that these sorts of sentiments were lurking in the law school community. She can think of nothing she had done to provoke, let alone deserve such treatment. She cannot understand why she has become a lightning rod for the ire of certain men.

In spite of her brief response on the day of the event -- and perhaps because of it as well as her spiel in the law school newspaper -- the hostility escalates.³ Final exams come and go that spring, and her grades suffer. The hostility does not just go away with the summer break, either; it returns with the students that fall, no longer in the form of overtly sexist behaviour or speech, but harassment all the same.⁴ It is now undeniably directed at the woman as an individual -- not at the female law review members as a group. The EIC can only conclude that her attempt to stand up for herself -- and, as she sees it, for the other women on law review and in the law school -- prompted such controversy and retaliation beyond the initial furor over the poster. She finds it ironic that such harassment has flowed from her mild-mannered stand. After all, one of her law professors had advised her shortly after the poster incident that if she really wanted to compel an appropriate response from the law school, she should go to the New York Times with her story; that would give the school a big "black eye" and perhaps finally prompt an appropriate institutional response. She tells the professor that she cannot do so because she really just wants the matter to die down; she wants the controversy to

³ She is given the "cold shoulder" treatment by many in the law review office and in the law school community.

⁴ A number of male law review members flatly refuse to complete the standard assignments and are generally belligerent to the EIC. Several items of the woman's personal property are stolen from the law review office, accessible only to law review members. Other law review members do not have items of personal property stolen.

go away. She does not want the law school to be fighting such a badge of shame for years to come; she does not think she has the psychic energy to deal with the consequences of such a move; and, besides, she is still confident that the school will "do the right thing" if the harassment persists. It does, and the law school does not.

At the end of the following year, as her law school career draws to a close, her frustration peaks. She has a stomach ulcer. A number of male law review members have refused to do their assigned work all year, and they have done so with impunity. She has learned, among many things, that the position of editor-in-chief requires a lot of work but is accompanied by no power.

That same spring, a law review member makes a specious honor code allegation against the woman, claiming that the woman is using the same research paper for credit in two different courses. The honor council allows the allegation to be made anonymously, an unprecedented decision in the history of the institution. It is clear that the person making the allegation could have had no knowledge on which to base it because the only person who has seen a draft of the first paper is the professor for whom she is writing it. The second paper is at that time being cite checked for publication as a comment in the law review, making it pretty clear that a hostile law review member's knowledge of the latter paper, conjecture about the former, and desire to harass the woman, has led to the charge. Seeing this as part of the continuing law review harassment, the woman appeals from the student-run honor council to the law school faculty to be allowed to face her accuser. She also asserts the honor code equivalent of malicious prosecution against her accuser, saying that he could not possibly have knowledge adequate to support the charge. The faculty deny her appeal. She defeats the charge a few days before her last round of final examinations begins. Her last semester's grades are well below her usual performance.

The woman can hardly wait to get away from that institution -- away from that legal community, that state. It doesn't seem that the perpetrators (by now their numbers increased well beyond the poster artists) have learned any lesson -- except that, perhaps, if one engages in obviously sexually harassing behavior, one *might* get into trouble. However, if one wants to make life miserable for a person bold enough to stand up to sexual harassment, it can easily be done -- at least in the context of an institution unprepared to rise to the occasion and do what is necessary to maintain a non-hostile educational environment in which all can flourish. The apparent lesson for the woman editor-in-chief is that she should never have spoken up about the poster -- not even in the relatively timid way she did -- because without institutional support, going it alone exacts a very high price. She will think twice before she responds similarly to any such situation that may arise in the future.

* * *

The story I have told is my own, and it is the provenance of this thesis. I have purposefully told it as I experienced it, eschewing legal language (to the extent one trained in the law can) in doing so. I do not pretend that it is objective or that it is complete. That it is *my* story, my experience is part of the point.

My year served out as editor-in-chief of the *Arkansas Law Review* was an extremely difficult one, the most difficult professional one of my life. Anyone who thinks the sort of harassment I have described is no big deal -- that it is just about hurt feelings -- has never dealt with it over an extended period of time. In spite of the bitter taste this experience left with me, I was determined to try to comprehend the social dynamic underlying it; I wanted something constructive to come from the experience. As I reflected on these events as they were happening and in the

years that followed, I wondered why the injury I had suffered by being labelled a "head giver" and "slut" was treated by so many around me as of no moment? How could they say it was a joke and find so many -- even some women who had been listed as candidates for the office of "Law Review Chief Head Giver"-- sympathetic to its acceptability on that basis? You cannot joke about things like that -- certainly not in an educational setting, can you? Who could see it as funny? Why was I treated as if I were over-reacting? I kept remembering what my mother told me as a child, when, as often happens among children, my feelings were hurt because I was taunted or called names. "Sticks and stones may break my bones, but words can never hurt me." The trite adage rang no more true with me as an adult than it had as a child. Of course words hurt. Besides, I felt less resilient than I had as a child; after all, these words were threatening the professional livelihood I had worked so hard to make for myself.

I had initially thought of the poster as ideologically bereft hate or assaultive speech, but later I began to contemplate whether the poster had a message and if so what it was. To label women law review members "head givers" was not, I was pretty sure, to imply that these men literally expected the female law review members to perform fellatio on them.⁵ No, what it was intended to convey, I was quite sure, was that woman's place was one of subservience (sexual and otherwise) to men, and not as intelligent contributors and decision-makers in an academic exercise and production like the law review. This interpretation seemed consistent also with the "coffee maker" category -- letting women know what they are fit for in a society still imbued with patriarchal ideology and gender-based double

⁵ Similarly, when men sexually harass women in employment settings by "asking" them for sex, they are rarely seriously proposing that the targeted woman engage in sexual acts with them. They say this offensive thing to harass and demean. See, e.g., *Hall v. Gus Construction Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988).

standards. As for the "slut" moniker, it could have been intended to imply that I was sexually promiscuous. (The dictionary lists various definitions, including "a slovenly, dirty woman," "immoral woman," "prostitute," and "brazen girl"⁶). This seemed unlikely, however, especially given that I was not and no one had any reason to believe that I was. Had the men used "slut" in the more commonly pejorative way that "bitch" is so often used -- to indicate an unpleasant woman, a shrew? Or, similar to "head giver," was the word "slut" used because its sexual connotation effectively "put me in my place," conveying to me that my proper role was not as the chief officer of an academic publication; rather, my true place -- like that of any woman -- was in the proverbial bedroom. I concluded that the poster's essential message was probably the latter, especially given the context in which it appeared -- on the day a woman became editor-in-chief of the law review. The men were rebuking me, in the cruelest of terms, for not knowing my "proper place" as a woman, for aspiring to do a "man's job."⁷

Increasingly frustrated by the law school's lack of acknowledgement of the poster -- let alone meaningful responsiveness to it -- I began to contemplate what causes of action I might have if I chose to seek legal redress for the injury I had suffered. A long-time student of media law, several causes of action came immediately to my mind, including defamation and intentional infliction of emotional distress. I recalled one of my professors saying at the time of the incident that it sounded to him like a "hostile

⁶ WEBSTER'S II NEW RIVERSIDE DICTIONARY (1984).

⁷ Interestingly, the 19th century case that upheld the constitutionality of a woman's denial of admission to law school endorsed a similar idea. In his concurrence in the decision in *Bradwell v. Illinois*, Justice Bradley referred to a law of "nature and the Creator" which decreed "the domestic sphere as that which properly belongs to the domain and functions of womanhood." 83 U.S. 130, 141 (1872).

working environment" -- the term of art used to describe a situation that provides a basis for a sex discrimination suit under federal employment law in the United States. As I thought cursorily through these options, I doubted that any of them would, as a practical matter, actually provide redress for my grievance.

I was not convinced, for example, that given the vagaries associated with the meaning of the word "slut," a jury would find it defamatory and, if it did, whether it would recognize damages flowing therefrom. After all, such crude labels and epithets are directed at women all the time; they hardly raise an eyebrow in many social settings these days. Plus, I knew that I was probably a "limited purpose public figure" for purposes of the law school community (I was very active in student affairs, serving as president of the law student's association at the time of the incident, as well as in other leadership capacities). Accordingly, under *New York Times*⁸ and its progeny, I would have to prove that the defendants knew the statement was false or acted in "reckless disregard" of its truth or falsity. Contemplating issues of truth and falsity reminded me that the defendants could argue that the intended meaning was that I did, in fact, "give head" and that I was, in fact, sexually promiscuous. That is, they might well raise the defense of truth. That would put my sexual practices at issue -- the burden either being on the defendants to prove that I was sexually immoral or on me to prove that I was not.⁹ Needless to say, that is not a discussion -- let alone a courtroom scenario -- that any woman would relish or to which she would lightly expose herself. Besides, I wondered, how could sexual morality

⁸ 376 U.S. 254 (1964).

⁹ The burden of proof depends on whether the matter is deemed to be of public concern. If it is, the burden of proof is on the plaintiff to prove falsity; if not, the burden of proof is on the defendant to prove truth. See *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986).

(or immorality) be quantified -- that is, what sorts of sexual practices, performed with what frequency in what circumstances render one a "slut"? It also seemed to me that the defendants could say they were just stating the *opinion* that I was a slut; it was not obviously a statement of fact. The oft-quoted maxim of First Amendment jurisprudence that "there is no such thing as a false idea" kept ringing in my ears. I didn't believe I could win a defamation suit based on the poster -- especially not before a local jury.

As for intentional infliction of emotional distress, I didn't think I had much chance of recovery on that basis, either. I recalled the legal standard for establishing this tort being quite extraordinary, requiring "outrageous" behavior. For similar reasons to those that led me to conclude that a local jury would not consider "slut" defamatory, I doubted that a local jury would consider the poster "outrageous." (After all, most of the people in the law school community did not seem to think it outrageous). Besides, the case of *Hustler Magazine v. Falwell*¹⁰ had then recently been decided by the U.S. Supreme Court, which meant that if I were considered a public figure (and I'd already concluded I was a limited purpose public figure), I would have to prove the higher degree of fault associated with public figure plaintiffs with regard to this tort, too.

As for the "hostile environment" analysis, I assumed it was irrelevant because the law review office was an educational setting, not an employment one. (We were, of course, working, but not for pay.) Still, it struck me that the same or a similar analysis should apply in the educational setting. As had been written in the then-recent *Meritor Savings Bank* decision, a woman should not have to run a gauntlet of sexual harassment in order to remain employed. Surely the same could be said of women

¹⁰ 485 U.S. 46 (1988).

trying to remain in law school or undertaking any educational pursuit!

First Amendment concepts like "political speech," "fighting words," and "imminent incitement to lawlessness" came to mind. I recalled that under *Chaplinsky v. New Hampshire*,¹¹ "fighting words"-- words that inflicted injury or tended to incite a breach of the peace -- were said not to be constitutionally protected. But then I remembered that the "injury-inflicting" prong of *Chaplinsky* had never been much relied on, and the words had not moved me to a "breach of the peace." This had not been about physical violence or breach of peace; it was about human dignity -- mine dignity to be precise. Besides, there was no relevant state statute under which a prosecution could be brought based on the speech and therefore no statute to which the *Chaplinsky* test would apply. In addition, I knew the entire *Chaplinsky* decision represented questionable precedent following several Supreme Court decisions in the 1970s. I remembered that speech characterized as "political" was, in principle, given the greatest degree of protection under the U.S. constitution because in the so-called marketplace of ideas, citizens need all the information they can get in order to make the best decisions about governance. Although ostensibly a verbal assault with no political content, I knew the poster's language could also be construed as a political comment about the "proper" role of women -- indeed, I believed this latter construction to be its essential meaning. I reasoned based on cases in which racially hateful speech was deemed constitutionally protected that the men's right to call me a "slut" was almost certainly also protected by the First Amendment.

The truth of the matter is that I never seriously considered suing the men who put up the poster. I did not have the emotional energy and reserves to undertake a lawsuit. Besides, one does not lightly undertake such a

¹¹ 315 U.S. 568 (1942).

costly endeavor, especially knowing that the repeated publication of the offending statement could do more harm than the paltry judgement for which one might hope could ever provide recompense.¹² What I really wanted was for someone in a position of authority at the law school to admit that I and the other women named on the poster had been injured, that the poster was objectionable, that the men were wrong to put it up, that the ensuing harassment of me as an individual was reprehensible, and that the institution would not tolerate such behavior. Not getting such a statement from the law school authorities, I was unable to put the event completely behind me. I was stunned, fascinated, and often gravely disappointed by people's reactions to what had happened in that law review office -- both at the time and as I later recounted the events to people both within and without the Arkansas legal community.¹³ Formerly an aspiring journalist, I had always been a big believer in the Supreme Court's absolutist interpretation of the First Amendment. But in the aftermath of the poster incident, I began to wonder why the law lent such enormous protection to such injurious speech. Why were communicative injuries like the one I suffered not legally cognizable?

The most disillusioning part, perhaps, was realizing that when I had put my own views into the "marketplace of ideas," explaining why the poster was objectionable,

¹² In the recent case of *Smith v. Atkins*, 622 So. 2d 795 (La. App. 4 Cir. 1993), a female law student who was called a "slut" in class by her professor was awarded a mere \$5,000 for prevailing in a defamation suit.

¹³ In the years since the incident, I have been asked by several prominent Little Rock lawyers about the controversy "I caused" as editor-in-chief. When I have explained what happened, starting with the poster, they have tended to shrug their shoulders and say, essentially, "boys will be boys." When I have described the incident to people outside the Arkansas legal community, they have typically been stunned and have sympathized about the situation I endured. Admittedly, this may be simply because the latter group of people are more "politically correct."

demeaning of women, and particularly unacceptable in an educational setting, I had become a pariah in the eyes of many in the law school community. The men were pitied martyrs for making a little joke, and I was the "feminazi" villain for objecting to it. So, the First Amendment protected the men's sexually hateful speech, but when I exercised my own First Amendment right, the practical effect was to provoke a sort of back-lash against women generally and myself specifically. Was I to conclude that the good old market-place of ideas did not work for me and perhaps did not work well for women at all -- that the truth of women's equality and dignity and person-hood was not prevailing?

The spring I finished law school, another (male) professor suggested some reading in "feminist jurisprudence" that might interest me. I do not believe that at that point I had ever heard of feminist jurisprudence; certainly I did not consider myself a feminist. Nevertheless, I read a few articles, and I found that a good deal of what these feminist legal scholars had to say was consistent with my experiences both in and out of law school. I had long been told that all the formal barriers were down and that women could do whatever they wanted professionally -- and my professional life was by far my main concern then. Yet, with this incident, I began to see that if I did not play the game the way "girls" were supposed to play it, my professional opportunities were likely to be severely circumscribed. The official story of "equality" looked like a myth. The greatest degree of "equality" women could achieve -- at least in that place and at that time -- had to be bought and part of the purchase price was playing by the rules of the dominant group (in this case men), including not rocking the boat if someone put up a sign labelling you a "slut."

* * *

The development of feminist scholarship in the past couple of decades has provided a forum -- albeit a still-marginalized one--for the purpose of thinking critically and imaginatively about stories like mine and the law's response (or lack thereof) to them. It has encouraged women, speaking in their own words and on their own terms, to create a "herstory" and to begin to apply feminist theory and reason to a wide range of issues, problems and situations. More specifically, feminist jurisprudence has developed as a discipline that welcomes and values women's own analyses of how the law has failed them -- frequently leaving them unprotected, often ignoring them as well as their needs, and treating them as lesser beings than men, deviant from the male norm -- and all the while purporting to be neutral and objective.

Feminist jurisprudence seeks to debunk this myth of law's neutrality. As a starting point, it assumes that gender is not merely a point of social differentiation; rather, within law as well as in other contexts, gender or sex is often a situs of subjugation, inequality, injury and partiality. In recent years, feminist legal scholarship has moved beyond analyzing only areas where the law's impact on women is obvious -- areas like family law, rape, and abortion. The discipline is now beginning to address the masculine assumptions of traditional jurisprudence generally, as well as in a broad range of legal contexts. Feminist legal scholars have become increasingly concerned with law's impact and not merely with law's "official story."

The feminist or gendered view-point of this project is informed by and utilizes various strands of feminist analysis and methodology, among others the feminist critique of public-private dichotomy, radical feminism's focus on "the difference difference makes," cultural feminism's alert to the value of women's "different voice," and so-called standpoint or positional epistemology. Because these analyses often utilize the very categories and

dichotomies that have served to trap women and associate them with certain characteristics and priorities, I employ them self-consciously, with a full awareness of this pitfall. In particular, I understand that utilizing these constructs risks reinforcing them, as well as re-producing the identities that I am questioning and challenging. Nevertheless, absent other commonly understandable groupings and labels, I default to the dominant ones which are, in many instances, still accurately descriptive.

* * *

Freedom of speech is a fundamental right that is frequently protected from state interference in the legal systems of Western democracies. Certainly, it is a critical right that pervades Anglo-American jurisprudence, and in U.S. constitutional law in particular, it is pre-eminent, even sacrosanct. Even speech that causes certain harms and speech that is offensive to a great majority of the populace is generally protected under the free speech precedents and principles of the United States; this is true to a lesser degree in Britain.

Over the years, political philosophers have justified this tenacious protection of speech on a number of bases. These range from Mill's belief that the rights were necessary to the ascertainment of the truth in the "marketplace of ideas"¹⁴ to the notion that free speech is important as an aspect of individual self-fulfillment and development.¹⁵ Other commentators, most notably Meiklejohn, have focused upon the need for an informed citizenry in any well-func-

¹⁴ See generally JOHN STUART MILL, ON LIBERTY (Everyman ed. 1972).

¹⁵ See generally FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY chs. 3-4 (1982); Thomas Scanlon, "A Theory of Freedom of Expression", in THE PHILOSOPHY OF LAW (ed. Ronald M. Dworkin) 159-60 (1977).

tioning democracy, accordingly narrowing the subject matter of the protected commentary.¹⁶

This project seeks to reveal whether the right to free speech, as it has been embraced and rationalized by Western democracies, is somehow "gendered." That is, is the concept of free speech an inherently masculine one, reflecting values associated with men? What is the function of the free speech right in a society that pays lip-service to formal equality for the sexes but in which women (and many others)¹⁷ do not enjoy meaningful equality? Does legal analysis of free speech cases proceed in a way that reveals clearly the values at stake? Does it permit exposure of the conflict between free speech and other rights? Do the articulated justifications for protecting the right to free speech reveal gendered priorities? This thesis explores these, as well as related inquiries.

On a more practical level, this project seeks to determine whether the application and invocation of specific points of freedom of expression law, particularly as interpreted by the U.S. Supreme Court, has impacted women differently than men. It examines whether the torts that address communicative injuries (defamation, invasion of privacy, and intentional infliction of emotional distress) -- the parameters and specifics of which are constrained by the First Amendment in U.S. jurisprudence -- reveal gendered trends, either in their historical and theoretical conception or in their judicial application. A number of cases that reveal assumptions about the parties based on their gender, as well as assumptions about proper gender roles, are discussed. Finally, the feminist critique of

¹⁶ See Alexander Meiklejohn, "Free Speech and Its Relation to Self-Government", in POLITICAL FREEDOM (1965).

¹⁷ I realize that there are many bases in addition to gender on which people are oppressed. These include race, class, religion, and sexual preference among others. That I do not discuss these or their intersection with gender is not to imply their lack of importance. I have simply made the decision to confine this project to gender.

obscenity law is reviewed because it provides a useful background for a considerable part of the feminist critique that is presented regarding other aspects of the legal regulation of speech.

The focus of this thesis is on the development of free speech theory under the First Amendment to the United States' Constitution, and on the impact of First Amendment doctrine on the U.S. laws regarding hate speech, defamation, invasion of privacy, and obscenity. While this is not formally a comparative law project, it draws on the legal precedents of Britain and, to a lesser extent, other Western democracies as they may be useful in contrasting how different jurisdictions have viewed the free speech principle.

* * *

A great deal of cross-disciplinary feminist thought and writing speaks of women's voices, women's language, and women's silence. As several post-structuralist scholars have recognized, we must understand the structures in culture and language in order to understand their systems of power.¹⁸ If women's language and women's voices have not been recognized or heard in our society -- let alone within our current legal culture¹⁹ -- it is important to

¹⁸ See generally MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE* (1970); JULIA KRISTEVA, *DESIRE IN LANGUAGE: A SEMIOTIC APPROACH TO LITERATURE AND ART* (1980).

¹⁹ See generally Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G*, (noting that "powerless" speakers, those stigmatized by gender, race, or class, do not participate equally in the rituals of the law; they often lack credibility because of the non-dominant linguistic and narrative conventions they use) in *FEMINIST LEGAL THEORY* (Katherine T. Bartlett and Rosanne Kennedy eds. 1991); Peggy C. Davis, *Contextual Legal Criticism: A Demonstration Exploring Hierarchy and "Feminine" Style*, 66 N.Y.U. L. REV. 1635, 1676-81 (discussing Conley O'Barr & Lind, *The Power of Language: Presentational Style in the Courtroom*, 1978 DUKE L. J. 1375).

consider whether, and if so why, the free speech principle, as it has been interpreted and invoked, has contributed to this silence. It is crucial to inquire whether current legal language, concepts, and norms related to constitutional and tort doctrines governing liability for speech have served to perpetuate the patriarchal structures in our laws and in our lives.

My examination begins with an overview of feminist jurisprudence before moving to a gendered critique of the law regarding extremist speech. Next, I consider through a gendered lens the torts of defamation and invasion of privacy. Finally, before stating my conclusions, I review the gendered critique of obscenity law.

An Overview of Feminist Jurisprudence

"The situation of women is like nothing else in the world."
Catherine MacKinnon
Feminism Unmodified (1987)

"Feminist scholarship makes sense only in the context of an
overwhelmingly sexist science."
Margit Eichler
The Double Standard: A Feminist
Critique of Feminist Social Science (1980)

I. INTRODUCTION

The first recorded use of "feminist jurisprudence" was at a 1978 Harvard Law School celebration commemorating the twenty-fifth anniversary of the institution's first women graduates.¹ At that time, a panel of judges, lawyers, and legal educators debated the most basic of questions: Was there in existence or should there be developed a feminist jurisprudence? Apparently the consensus reply to both queries was then no, perhaps in part because the label invoked images of political cries for special legal treatment for women.²

¹ Carol Smart asserts that feminist jurisprudence originated in the nineteenth century, even though such a concept would have been unknown to the feminists of that era. Women's movements then had their grounding in the liberal philosophy of equal rights, protesting material restrictions upon women such as bars to educational and political opportunities. See Carol Smart, *Feminist Jurisprudence* in SUPPLEMENTARY JUSTICE (Peter Fitzpatrick, ed. 1990) [hereinafter Smart, *Feminist Jurisprudence*].

² See Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191, 193 (1989) [hereinafter Cain, *Grounding the Theories*] (attributing to Professor Ann Scales, then a Harvard Law student, who moderated the debate); Ann Scales, *Towards a New Feminist Jurisprudence*, 56 IND. L.J. 375 (1980) [hereinafter Scales, *New Feminist Jurisprudence*]. See also Kathleen Lahey, . . . *Until Women Themselves Have Told All They Have to Tell* . . . , 23 OSGOODE HALL L.J. 519, 520, 524 (1985) [hereinafter

In spite of that early rejection of the project's "packaging" and imperative, a feminist jurisprudence--both movement and discipline in one--has emerged.³ It is at the same time a critique within legal scholarship and education and a challenge to the structure of those institutions.⁴ To call it a movement is to acknowledge that it adopts an admitted and self-consciously critical stance toward orthodox jurisprudence and is focused upon the common goals of raising the law's awareness and understanding of, as well as its responsiveness to, women "as women."

Lahey, *Until Women Themselves*] (noting the argument against feminist legal theory that it is not really scholarship because it is too overtly political to be anything other than polemic; quoting MARGIT EICHLER, *THE DOUBLE STANDARD: A FEMINIST CRITIQUE OF FEMINIST SOCIAL SCIENCE* (1980)).

Although we are uncertain about all the reasons why this particular panel at Harvard rejected the need for a feminist jurisprudence, British sociologist Carol Smart has articulated her own. She asserts that any search for feminist vision that can help reform the law is idealized, noting that only when the "central role of law as an organizing principle in of everyday life is . . . challenged" can we rebut the assumed need for some form of jurisprudence. See Carol Smart, *Feminist Jurisprudence*, *supra* note 1, at 17.

³ Interestingly, as recently as two or three years ago, some denied that a feminist jurisprudence had yet developed, preferring to refer to it as "feminist legal theory." See, e.g., Cain, *Grounding the Theories*, *supra* note 2, at 194 n.12; Jenny Morgan, *Feminist Theory as Legal Theory*, 16 MELBOURNE U. L. REV. 743 (1988); Adrian Howe, 'Social Injury' Revisited: Towards a Feminist Theory of Social Justice, 14 INT'L J. OF SOC'Y OF LAW 423, 428 (1987) [hereinafter Howe, 'Social Injury' Revisited]; Christine Littleton, *In Search of a Feminist Jurisprudence*, 10 HARV. WOMEN'S L.J. 1 (1987) [hereinafter Littleton, *Search*]. Other less recent admissions of the struggle to develop this area include Catherine MacKinnon, Panel Discussion, "Developing Feminist Jurisprudence," at the 14th National Conference on Women and Law, Washington, D.C. (April 9, 1983), quoted in Heather Wishik, *To Question Everything: The Inquiries of Feminist Jurisprudence*, 1 BERKELEY WOMEN'S L.J. 64 (1986) [hereinafter Wishik, *To Question Everything*]; Scales, *Towards Feminist Jurisprudence*, *supra* note 2.

⁴ Littleton, *Search*, *supra*, at 2.

To label it discipline, however, is not to imply that it is organized around a single theory.⁵ Consistent with feminist goals in other contexts, much feminist jurisprudence avoids "Theory" altogether, choosing instead to focus upon the practical reality of women's experiences and concerns.⁶ In fact, one of the only remaining unifying themes of feminist jurisprudence--yet still one about which different strands vary as to its centrality and importance--is that women's experience must be revealed and communicated.⁷ The women's "truth"⁸ revealed in turn provides a stance from which and a basis for critique of the method, procedure, and substance of the law, offering both supplement and correction. Feminist legal scholars frequently write in reformist terms--"of challenging, subverting, or transforming legal relations at their core."⁹ They question vested interests, uproot familiar and comfortable

⁵ See generally John Shotter and Josephine Logan, *The Pervasiveness of Patriarchy: On Finding a Different Voice*, (questioning whether a distinctly feminist practice or comprehensive mode of thought can exist in such a patriarchal culture) in *FEMINIST THOUGHT AND THE STRUCTURE OF KNOWLEDGE* (Mary McCanney Gergen, ed. 1988). Some individual strands of feminist jurisprudence are based on theory, most notably MacKinnon's brand of radical feminism. See *infra* Sect. V.

⁶ See *infra* Sect. VII (discussing the related matter of feminist epistemology).

⁷ See *infra* Sect. VII and accompanying text (discussing methodology and epistemology); accord Deborah Rhode, *Feminist Critical Theories*, 42 *STAN. L. REV.* 617, 621 (1990) [hereinafter Rhode, *Critical Theories*].

⁸ It is important to note that many feminist legal theorists reject the potentiality of discovering any single unifying "women's" truth, although they believe that each individual woman may discover her own truth through methods such as consciousness-raising. One of the paradoxes of feminist jurisprudence is reflected here: the conflict of individuality of experience among women with the search for a unifying experience from which we can formulate an agenda for legal change. See also Susan Williams, *Feminist Legal Epistemology*, 8 *BERKELEY WOMEN'S L.J.* 63 (1993).

⁹ Littleton, *Search*, *supra* note 3, at 2.

perspectives, and defy the status quo.¹⁰ They question the highly structured nature of legal method, the form and patterns of legal inquiry and decision-making, and legal "ways of knowing."¹¹

Still, as feminist jurisprudence has developed in recent years, the label has continued to be problematic in the eyes of some. It has been referred to as "oxymoron"¹² and "conceptual anomaly"¹³ and likened to "a modern quest for the Holy Grail."¹⁴ The common theme of these commentators--most of whom are not hostile to the movement/discipline--is that the traditional, dominant jurisprudence is so masculine that any feminist perspective on it is inaccurate or, at best, strictly marginalized in

¹⁰ See generally Mary Jane Mossman, *Feminism and Legal Method: The Difference it Makes*, 3 WISC. WOMEN'S L.J. 147 (1987) [hereinafter Mossman, *Feminism and Legal Method*](quoting A FEMINIST PERSPECTIVE IN THE ACADEMY: THE DIFFERENCE IT MAKES (Langland and Gove, eds. 1981)).

¹¹ See *id.* at 149, 167; see generally Katherine Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990) [hereinafter Bartlett, *Feminist Legal Methods*]; Cain, *Grounding the Theories*, *supra* note 2; Lahey, *Until Women Themselves*, *supra* note 2, at 527; Patterson, *Postmodernism/Feminism*, *infra* note 16; A. W. Phinney III, *Feminism, Epistemology and the Rhetoric of Law: Reading Bowen v. Gilliard*, 12 HARV. WOMEN'S L.J. 151 (1989).

¹² Ann Scales, *Militarism, Male Dominance and Law: Feminist Jurisprudence as Oxymoron?*, 12 HARV. WOMEN'S L.J. 25 (1989).

¹³ Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 4 (1988)[hereinafter West, *Jurisprudence and Gender*].

¹⁴ Carol Smart, *Feminist Jurisprudence*, *supra* note 1, at 17 (citing CAROL SMART, *FEMINISM AND THE POWER OF LAW* (1989)). As Moira Gatens has written, "there cannot be an unadulterated feminist theory which would announce our arrival at a place where we could say we are 'beyond' patriarchal theory and patriarchal experience." Moira Gatens, *Feminism, Philosophy and Riddles Without Answers*, in FEMINIST CHALLENGES 26 (C. Pateman & E. Gross eds. 1986).

the current patriarchal society.¹⁵ Some carry the argument a step further, asserting that the establishment or embrace of any form of jurisprudence is antithetical to feminism and that feminists should be challenging the "central role of law as an organizing principle in everyday life."¹⁶

My¹⁷ discomfort with (but not outright rejection of)

¹⁵ For example, Catherine MacKinnon has asserted that the female cannot articulate her own definitions, goals, thoughts "because his foot is in her mouth." Ellen DuBois, Mary Dunlap, Carol Gilligan, Catherine MacKinnon, Carrie Menkel-Meadow, *Feminist Discourse, Moral Values, and the Law--A Conversation*, 34 BUFF. L. REV. 11 (1985) [hereinafter *Feminist Discourse, A Conversation*]. See also Mossman, *Feminism and Legal Method*, supra note 10, at 148-49 (questioning the extent to which feminist theory can impact the structure of legal inquiry); Janet Rifkin, *Toward a Theory of Law and Patriarchy*, 3 HARV. WOMEN'S L.J. 83 (1980) (noting that because law plays a "primary and significant role in social order" it is powerful as both a "symbol and vehicle for male authority")' West, *Jurisprudence and Gender*, supra note 13, at 4 (explaining that feminists take women's humanity seriously, but jurisprudence and law do not, and until this changes, "feminist jurisprudence" is a political impossibility). But see Cain, *Grounding the Theories*, supra note 2, at 193-94 (asserting that women who have at some point rebelled against patriarchy have experienced at least "glimpses" of their own authenticity).

¹⁶ See Smart, *Feminist Jurisprudence*, supra note 1, at 17. Smart also criticizes the point at which "feminist jurisprudence becomes almost a messianic movement and [where] notions of the limits of the ability of law (whether feminist or not) to transform social reality are forgotten. *Id.* at 19.

Most recently, commentators have begun to state this critique in political philosophy parlance: Feminists must bypass the modernist perspective of law--a system employing concepts of objectivity, truth, and reason--and embrace the post-modern perspective, with its themes of practice, critique, and localism. See Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254 (1992) [hereinafter Patterson, *Postmodernism/Feminism*].

¹⁷ My use of the first person throughout this thesis is purposeful. One important aspect of the feminist critique of law (as well as of the Critical Legal Studies movement) has been the expressed doubt of law's purported objectivity and an emphasis on feminist methodology. Such methodology admits the subjective, personal perspective. See Lucinda Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE

the "feminist jurisprudence" label has somewhat different bases. In essence, I believe it may no longer accurately reflect the nature of the project--or at least what I believe the project should be and do. First, it evokes images of an "us-them" mentality, which I believe contributes to the misunderstanding and defeat of the enterprise, as well as to the continued isolation of women. Just as it defines, it also marginalizes. Secondly, I agree with Katharine Bartlett who has asserted that use of the "feminist" label has provoked assumptions of a standard woman; it is a "fixed, exclusionary, homogenizing, and oppositional" term--one embracing an essentialism that feminists have criticized in dominant jurisprudence.¹⁸ Women of color, for example, have objected vigorously to such essentialism, decrying white middle-class feminism's attempt to set a single standard, state a single description of all women.¹⁹

DAME L. REV. 886, 886-87 (1989) [hereinafter Finley, *Gendered Nature of Legal Reasoning*]; see also *infra* Sect. VII. Kathleen Lahey has commented on dominant ideology's "condemnation of feminist 'subjectivity' or 'polemic'," noting that its "privileged stance of (universalist) male scholars gives them the authority to declare other scholars to be deficient in some crucial quality." Lahey, *Until Women Themselves*, *supra* note 2, at 526. See also Lacey, *Beyond Neutrality*, *infra* note 18, at 2 ("writing . . . in the first person . . . does not undermine any value which there may be in what I have to say.")

¹⁸ See Bartlett, *Feminist Legal Methods*, *supra* note 11, at 834; Patterson, *Postmodernism/Feminism*, *supra* note 16; Nicola Lacey, *Feminist Legal Theory Beyond Neutrality*, 48 CURRENT LEGAL PROBLEMS 1, 12 (1995) [hereinafter Lacey, *Beyond Neutrality*].

¹⁹ See generally PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Anarchist Politics*, in FEMINIST LEGAL THEORY (Bartlett and Kennedy, eds. 1991); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, in FEMINIST LEGAL THEORY (Bartlett and Kennedy, eds. 1991); Gloria Joseph, *The Incompatible Menage a Trois: Marxism, Feminism, and Racism*, in WOMAN AND REVOLUTION (L. Sargent ed. 1981); Marlee Kline, *Race, Racism, and Feminist Legal Theory*, 12 HARV. WOMEN'S L.J. 115 (1989); see also generally, RHODE, *JUSTICE AND GENDER*, *infra*; Rhode, *Feminist*

Moreover, because much of the current feminist jurisprudence posits a gender-oriented rather than sex-oriented analysis, it may perpetuate unhealthy, unhelpful, and inaccurate stereotypes about the "nature of women." This reinforces identification of women--or at least the "feminine"--with certain characteristics and traits, an identification that--even if currently an accurate description--in the long run limits choices and possibilities for both women and men. Some scholars, perhaps sharing early reservations about embracing the "feminist" label, have begun to speak simply of gender and gendered analyses.²⁰ However, I am doubtful about whether use of this alternate label truly resolves the problem I perceive. While it is more politically palatable to many, it still implicitly adopts gender--rather than sex which determines gender²¹--as the primary (and sometimes essential) category for analysis. Accordingly, it plays off a feminine-masculine dichotomy, representing the very sort of dualism it frequently rejects.²²

One may ask what difference the name actually makes. Some scholars, like Leslie Bender, believe a great deal. She maintains that labels are divisive and cause ideas to "become fixed instead of remaining fluid and growing."²³ Nevertheless, at this stage, they are helpful, perhaps even still necessary. They allow us to identify currently existing categories. Furthermore, if feminist jurispru-

Critical Theories, *supra* note 7.

²⁰ See generally, e.g., DEBORAH RHODE, *JUSTICE AND GENDER* (1989) [hereinafter RHODE, *JUSTICE AND GENDER*]; West, *Jurisprudence and Gender*, *supra* note 13; Joan Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989).

²¹ See *infra* notes 59-61 and accompanying text.

²² See Patterson, *Postmodernism/Feminism*, *supra* note 16.

²³ Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 5 n.5 (1988); see also Patterson, *Postmodernism/Feminism*, *supra* note 16.

dence is able to achieve its goals, the issue will have been resolved, as the discipline/movement will have integrated and compromised traditional patriarchal jurisprudence so that it no longer needs a distinguishing signifier.

At any rate, the substance of the project is at least equally as important as the name, and I will now turn to a brief historical overview of feminist jurisprudence. Following that, I will examine more closely some of the more prominent analyses within feminist jurisprudence, seeking to reveal the paradoxes within and among them in order to formulate an agenda about where feminist jurisprudence should go from here.

II. A BRIEF HISTORY OF FEMINIST JURISPRUDENCE

Feminist jurisprudence began with an attempt to cure women's obscurity and even invisibility in the law. This was reflected in the "women and the law"²⁴ approach of the 1970s, an approach that soon demanded a shift in methodology as it became evident that to "add women and stir" was inadequate, frequently functioning only descriptively and rarely prescriptively.²⁵ These attempts were nevertheless helpful initially, as they drew attention to women and put some of their concerns on the political agenda, being particularly instrumental in the early development of discrimination doctrine.²⁶ However, carried to its logical conclusions, the approach often proved problematic because

²⁴ See generally, e.g., SUSAN ATKINS AND BRENDA HOGGETT, *WOMEN AND THE LAW* (1984); Karen Offen, *Feminism and Sexual Difference in Historical Perspective*, in *THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE* (Deborah Rhode, ed. 1990); Wendy Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. SOC. CHANGE 325 (1984).

²⁵ See, e.g., Wishik, *To Question Everything*, *supra* note 3, at 67-68 (mere inclusion is not the goal of feminist jurisprudence).

²⁶ See generally RHODE, *JUSTICE AND GENDER*, *supra* note 20, at ch. 5, 81-107.

as the sameness vs. difference and special treatment vs. equal treatment debates often evolved, women (along with what had been labeled "feminine" values) were often left judged by both male (biologically speaking) and masculine (socially speaking) standards.²⁷

The next wave of feminist analyses sought to overcome the limitations of its predecessors by shifting epistemological and methodological focus. Feminists found themselves unable to ignore methodology, having learned that challenging existing power structures with the same methods that defined those structures risked recreation of different, but equally illegitimate frameworks.²⁸ Included in these second-stage approaches have been relational or cultural feminism's "celebration of difference,"²⁹ radical

²⁷ This dilemma is well reflected in the debate surrounding the quest for ratification of the Equal Rights Amendment to the U.S. Constitution. From 1972 when the U.S. Senate and House of Representatives passed the amendment until the 1982 state ratification deadline, the campaigns for and against ratification often focused upon gender difference rather than upon gender disadvantage/hierarchy, conferring more importance upon formal rights than upon cultural context. See generally RHODE, *JUSTICE AND GENDER*, *supra* note 20, at 63-80, 306-307.

See also, e.g., ELIZABETH WOLGAST, *EQUALITY AND THE RIGHTS OF WOMEN* (1980); Elizabeth Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U.L.REV. 589, 634-35 (1986) [Schneider, *Dialectic of Rights and Politics*]; Lucinda Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986); Ann E. Freedman, *Sex Equality, Sex Difference and the Supreme Court*, 92 YALE L.J. 913 (1983); Lacey, *Beyond Neutrality*, *supra* note 18, at 6; Catherine MacKinnon, *Excerpts from MacKinnon/Schlafly Debate*, 1 LAW & INEQUALITY: J. THEORY & PRAC. 341-42 (1983); Wendy Williams, *The Equality Crisis: Some Reflections on Culture, Courts and Feminism*, 7 WOMEN'S RTS. L. REP. 175 (1982).

²⁸ See Bartlett, *Feminist Legal Methods*, *supra* note 11.

²⁹ See generally, e.g., CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982) [hereinafter GILLIGAN, *DIFFERENT VOICE*]; Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1986); Suzanna Sherry, *Civic Virtue and the Feminine Voice in*

feminism's gendered hierarchy/dominance framework,³⁰ and the public-private (market-family) dichotomy.³¹ Other less prominent analyses have included mostly variations on and even combinations of these themes.³² A few, however, merit

Constitutional Adjudication, 72 VA. L.REV. 543 (1986); West, *Jurisprudence and Gender*, *supra* note 13.

³⁰ See generally, e.g., RHODE, *JUSTICE AND GENDER*, *supra* note 20, at 1-6, 81-86, 305-21 (specifically preferring the term "gender disadvantage" to MacKinnon's "gender dominance"); CATHERINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989) [hereinafter MACKINNON, *FEMINIST STATE*] (constructing a theory of gender hierarchy and dominance); CATHERINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987) [hereinafter MACKINNON, *FEMINISM UNMODIFIED*]. See also Marie Ashe, *Mind's Opportunity: Birthing a Poststructuralist Feminist Jurisprudence*, 38 SYRACUSE L. REV. 1129 (1987) [hereinafter Ashe, *Mind's Opportunity*].

³¹ See generally, e.g., SUSAN MOLLER OKIN, *JUSTICE, GENDER AND THE FAMILY* (1989) [hereinafter OKIN, *GENDER AND FAMILY*]; KATHERINE O'DONOVAN, *SEXUAL DIVISIONS IN LAW* (1985); Nadine Taub and Elizabeth Schneider, *Perspectives on Women's Subordination and the Role of Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 117 (David Kairys ed., 2d ed 1990); CAROLE PATEMAN, *THE SEXUAL CONTRACT* (1988); Nancy Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV.C.R.-C.L.L.REV. 79 (1989); Elizabeth Fox-Genovese, *The Legal Status of Families*, 77 CORNELL L. REV. 992 (1992); Jane E. Larson, *The Sexual Injustice of the Traditional Family*, 77 CORNELL L. REV. 997 (1992); Fran Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983) [hereinafter Olsen, *Family and Law*].

See also MARILYN WARING, *IF WOMEN COUNTED* (1988); SUSAN ATKINS AND BRENDA HOGGETT, *WOMEN AND THE LAW*, ch. 6 (1984); Regina Graycar, *Hoovering as a Hobby: The Common Law's Approach to Work in the Home*, 28 REFRACTORY GIRL 22 (1985); Sylvia Law, *Women, Work, Welfare and the Preservation of Patriarchy*, 131 U.PA.L.REV. 1249 (1983).

³² One exception might be that stated by Robin West, who asserts that both radical feminists and cultural feminists implicitly embrace some version of what she calls a "connection thesis." This thesis is that "[w]omen are actually or potentially materially connected to other human life [while m]en aren't." West, *Jurisprudence and Gender*, *supra* note 13, at 14. West identifies this in cultural feminism's emphasis upon women's subjectivity, their value of intimacy, and their capacity for nurturing and care of "others" to whom they are connected. She identifies this in radical feminism's focus upon invasion and intrusion of

independent mention, such as Tove Stang Dahl's "women's law", which incorporates what she calls realist, experiential method and social science.³³ Others include a social injury approach, discussed primarily by Adrian Howe, but also included within the work of many other writers,³⁴ and a standpoint/positionality approach, generally advocating consciousness raising and legal narrative or story-telling as method, and focusing on women's experience to inform solutions.³⁵ The categories are not static, and the doctrinal combinations are seldom simple.³⁶

the female body. *Id.* at 15.

Furthermore, some commentators have found merit in both systems of thought, finding them not necessarily to be mutually exclusive. Jenny Morgan at the University of Melbourne has written that both Gilligan and MacKinnon are correct--the former because theory about women's different approaches to problem solving validates the feelings many women have had about legal education and practice, and the latter because she doubts that women are inherently different in their approaches to decision making and is skeptical that women would embrace such an ethic of caring if they really had a choice. See Jenny Morgan, *Feminist Theory as Legal Theory*, 16 U. OF MELBOURNE L. REV. 743 (1988).

³³ See generally TOVE STANG DAHL, *WOMEN'S LAW--AN INTRODUCTION TO FEMINIST JURISPRUDENCE* (R.L.Craig, trans. 1987); Tove Stang Dahl, *Taking Women as a Starting Point*, 14 INT'L J. OF SOC'Y OF LAW 239 (1986) (addressing feminist perspectives within the tradition of black letter law). See also Agnete Weis Bentzon, *Comments on Women's Law in Scandinavia*, 14 INT'L J. OF SOC'Y OF LAW 249 (1986); Smart, *Feminist Jurisprudence*, *supra* note 1, at 1 (commenting upon Dahl's work).

³⁴ See generally Howe, *'Social Injury' Revisited*, *supra* note 2; Mari Matsuda, *Considering the Victim's Story*, *infra* note 129.

³⁵ See generally MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW* (1990); Bartlett, *Feminist Legal Method*, *supra* note 11; Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7 (1987); Patterson, *Postmodernism/Feminism*, *supra* note 16.

³⁶ An example of the complimentary nature of these various theories and analyses can be seen in Catherine MacKinnon's work. Although I categorize her as a radical feminist (as she herself does), she claims consciousness-

To better understand these primary theories and how each has contributed to the shaping of a broader, more comprehensive feminist jurisprudence, further consideration is necessary. Additionally, viewing all these various phases of development and feminist theories along a time line is useful for assessing their roles and significance in the development of a feminist jurisprudence.

III. WOMEN AND THE LAW

Most early (c. pre-1980) writing about law's treatment of and attitudes about women falls loosely within this category. Usually, such writings addressed matters that traditionally have been considered "women's issues", including rape, reproductive rights, and, perhaps, workplace discrimination. By this time, most "formal" barriers to women's political and professional participation had been dismantled, but situations unique to women--many related to their biological nature--still appealed for legal understanding and action. The U.S. Supreme Court had not (and still has not) accepted gender as a "suspect classification", thus failing to accord women the same degree of "strict scrutiny" protection that it has provided other groups that are vulnerable on the basis of their race, religion or national origin.³⁷ As women continued to experience harassment, disparate treatment, and unequal opportunities in different contexts--discrimination in forms for which the law provided no redress--they began to look for new solutions. Once again, an early strategy was

raising as her methodological and epistemological approach, and she also discusses the import of the public-private dichotomy's function in law. See *infra* Sect V; see also MACKINNON, *FEMINIST STATE*, *supra* note 30, at 182-94 (discussing abortion).

³⁷ See generally JOHN NOWAK, RONALD ROTUNDA & J. NELSON YOUNG, *CONSTITUTIONAL LAW*, ch. 16, 713-31 (2d ed. 1983).

to raise women's visibility³⁸--to draw attention to their situations which, all too frequently evinced their economic, social and even physical plight. These activists did enjoy some successes. For example, even though *Roe v. Wade*³⁹, the 1973 abortion rights decision of the U.S. Supreme Court spoke in terms of the right of privacy rather than recognizing women's reproductive freedom, it was nevertheless a victory for women. Another achievement that might be associated with this era came in the area of rape law reform. Marital immunity from rape prosecution was abolished in some states,⁴⁰ and rape shield laws were adopted to squelch the illicit and irrelevant innuendo of defense attorneys in rape trials.⁴¹

Also contributing to the debate--at least in the United States--was the 1972 U.S. Senate and House of Representatives passage of the Equal Rights Amendment and the ensuing ratification contests in the individual states. Discussion and campaigns ultimately focused on whether a formal prohibition against gender classifications would in fact improve women's legal status and lives. With these issues high on the political agenda and dominant in the media through the 1970s, it was not surprising that some legal scholars continued to focus upon legal solutions for women's problems. Nor was it surprising that the preferential versus equal treatment, sameness versus difference debates soon dominated the discussion.⁴² Those concerned

³⁸ The phrase "once again" is appropriate here because this task had already been accomplished, if only temporarily and partially, during the suffrage movement of the early twentieth century. See generally RHODE, JUSTICE AND GENDER, *supra* note 20, at 12-28.

³⁹ 410 U.S. 113 (1973).

⁴⁰ See generally SUSAN ESTRICH, REAL RAPE, 72-79 (1987) [hereinafter ESTRICH, REAL RAPE]; DIANNA RUSSELL, RAPE IN MARRIAGE, ch. 2 (2d ed. 1990) [hereinafter RUSSELL, RAPE IN MARRIAGE].

⁴¹ See generally ESTRICH, REAL RAPE, *supra* at 57, 88.

⁴² See, e.g., authorities cited at note 27.

about women, their social situation, and their continuing legal concerns, foreseeing the paradoxes inherent in this debate, began to look for new solutions.

IV. CULTURAL/RELATIONAL FEMINISM

The same decade that witnessed the political activism of liberal feminists advocating equality within the law also, paradoxically, saw feminist academics in other disciplines rediscover and focus upon the differences between men and women.⁴³ The germinal work grounding what has become known as relational or cultural feminism is Carol Gilligan's 1982 book, In a Different Voice. Based on her own research in developmental psychology, Gilligan posited that, contrary to previous studies, females are not inferior to males with regard to development of their moral decision-making faculties.⁴⁴ In the "feminine" decision-making process, Gilligan identified a "different voice"--a voice grounded in a "standard of relationship, an ethic of nurturance, responsibility, and care."⁴⁵ According to Gilligan, this standard of responsibility manifests itself in a different moral imperative for women.⁴⁶ In the final analysis, she defines the masculine voice as a rights-based ethic of justice and the feminine as a relational-oriented ethic of caring. In a sense, Gilligan's work reflects a "separate but equal" idea; she has not advocated changing or adapting what she labels the "feminine", only a greater appreciation of its value in our society.

⁴³ See, e.g., NANCY CHODOROW, THE REPRODUCTION OF MOTHERING (1978); DOROTHY DINNERSTEIN, THE ROCKING OF THE CRADLE (1978); GILLIGAN, DIFFERENT VOICE, *supra* note 29.

⁴⁴ See GILLIGAN, DIFFERENT VOICE, *supra* note 29, at 18-22, 25-40 (referring to Lawrence Kohlberg's 1958, 1973 and 1981 studies, which had determined girls inferior to boys in regard to the development of their capacity for moral reasoning and decision-making).

⁴⁵ *Id.* at 159-60.

⁴⁶ *Id.* at 100.

While the relational/cultural feminist analysis lent itself more easily to many of the family, workplace, and discrimination issues, it provided little insight about other issues such as sexual violence against women. And, while it might have been considered prescriptive with regard to those issues where it found direct application, the prescription was usually that women could (and perhaps should) find happiness and satisfaction in their present nurturing roles and, essentially, that they should celebrate their difference, their own accomplishments, and be content.⁴⁷ Society, in turn, should attribute greater value to these characteristics and roles.

Others adopted Gilligan's positive outlook about gender difference and began to utilize this "feminine" concept as critique of the dominant ideology. A significant corpus of literature affirming and applying her theory proliferated in the 1980s, with her masculine-feminine dichotomy⁴⁸ finding application in numerous contexts. These have included legal education⁴⁹ and practice,⁵⁰ children's rights,⁵¹ employment discrimination,⁵² sexual

⁴⁷ For an excellent critique of Gilligan, see Joan Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989).

⁴⁸ I use the "masculine-feminine" here to indicate socialized gender, although Gilligan's work actually seems to border on biological determinism, which would be more accurately reflected in "male-female dichotomy."

⁴⁹ See Christine Wiseman, *The Legal Education of Women: From "Treason Against Nature" to Sounding a "Different Voice"*, 74 MARQ. L. REV. 325 (1991); *Feminist Discourse, A Conversation*, *supra* note 15, at 49-57.

⁵⁰ Menkel-Meadow, *Portia in a Different Voice*, *supra* note 27; Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29 (1987); see also Lucie White, *Paradox, Piece-Work, and Patience*, 43 HAST. L. J. 769 (1992).

⁵¹ Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1, 15 (1987).

harassment,⁵³ mediation,⁵⁴ legal reasoning,⁵⁵ and even corporate,⁵⁶ tort,⁵⁷ and contract law⁵⁸ doctrines.

Gilligan's starting point is with where women are, and she does not specifically address how they got there. However, her discussion of female children's development of an identity that is continuous with their mothers', as primary caretaker, comes uncomfortably close to embracing biological determinism as the genesis of this different voice,⁵⁹ and this implicit assumption has been criticised by commentators.

Others, however, have gone a clear step beyond Gilligan, explicitly drawing the connection between the caring ethic or sense of connectedness that women experi-

⁵² Paul Spiegelman, *Court-Ordered Hiring Quotas after Stotts: A Narrative on the Role of the Moralities of the Web and the Ladder in Employment Discrimination Doctrine*, 20 HARV. C.R.-C.L. L. REV. 339 (1985).

⁵³ See, e.g., Note, *The Reasonable Woman Standard: Preventing Sexual Harassment in the Workplace*, 18 WM. MITCHELL L. REV. 795 (1992) (discussing "reasonable woman" standard in sexual harassment law and men's and women's differing perceptions of situations).

⁵⁴ Janet Rifkin, *Mediation from a Feminist Perspective: Promises and Problems*, 2 LAW & INEQUALITY: J. THEORY & PRAC. 21 (1984).

⁵⁵ Finley, *Gendered Nature of Legal Reasoning*, *supra* note 17, at 886.

⁵⁶ Kathleen Lahey and Sarah Salter, *Corporate Law in Legal Theory and Legal Scholarship: From Classicism to Feminism*, 23 OSGOODE HALL L.J. 543 (1985).

⁵⁷ Lucinda Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J. OF L. AND FEMINISM 41 (1989); Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV. (1993); JOANNE CONAGHAN AND WADE MANSELL, *THE WRONGS OF TORT*, ch. 7 (1993).

⁵⁸ See Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Patricia Tidwell and Peter Linzer, *The Flesh-Colored Band Aid--Contracts, Feminism, Dialogue and Norms*, 28 HOUS. L. REV. 791 (1991).

⁵⁹ GILLIGAN, *DIFFERENT VOICE*, *supra* note 29, at 151-74.

ence and their biological sex. Probably the most influential of these recently has been Robin West, whose "connection thesis" holds that "[w]omen [but not men] are actually or potentially materially connected to other human life."⁶⁰ West bases her thesis on four points at which, she asserts, women experience actual or potential connection but men do not: pregnancy, nursing, heterosexual intercourse, and menstruation.⁶¹

To Gilligan's credit, I acknowledge that she articulated an appealing--and for many women historically affirming--challenge to male norms. However, I tend to agree with Ann Scales's analogy of In a Different Voice to a racial counterpart of an earlier time, Uncle Tom's Cabin, in terms of the potential danger to women by its portrayal and consequent reification of the "feminine."⁶² Catherine MacKinnon has also been highly critical of Gilligan's work, partly because of Gilligan's failure to explain *why* women develop this different voice and partly because she fears women will identify with Gilligan's positively valued feminine stereotype not because it is the "real" her, but because society has attributed it to her.⁶³ As another

⁶⁰ West, *Jurisprudence and Gender*, *supra* note 13, at 16.

⁶¹ West, *Jurisprudence and Gender*, *supra* note 13, at 2-3. West prefers the label "material explanation"--rather than biological determinism--for her connection thesis. *Id.* at 21 (noting that the French cultural feminists support her thesis). She explains the general American rejection of material explanation on several grounds: (1) material explanations require willingness to engage in speculative inquiry, a willingness to consider phenomenological explanations, which academics tend to lack; (2) for strategic reasons, as American feminists have realized that most disadvantages imposed on women in the work-force and elsewhere derive from the central reality of women's pregnancy potential. *Id.*

⁶² Ann Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L. J. 1373, 1381 (1986).

⁶³ See *Feminist Discourse, A Conversation*, *supra* note 15, at 74-75.

commentator put it, what cultural and other branches of "difference" feminism celebrate as women's culture concurrently "encourages women to 'choose' economic marginalization and celebrate that choice as a badge of virtue."⁶⁴ These latter comments and others similar to them have been rebutted, to a certain degree, by Carol Smart, another non-lawyer, who notes that "[a]ll 'knowledge' can be put to reactionary use and Gilligan's work does not carry a special responsibility in this respect."⁶⁵ Smart sees value in Gilligan's identification of a "hierarchy of moral reasoning" as well as in her recognition of "subjugated modes" that may be used to challenge the existing dominant ideology.⁶⁶ Whatever the merits or empirical sustainability of Gilligan's study,⁶⁷ the feminine voice she portrays is significant for the normative value that relational feminists have ascribed to it. Feminists have been attracted by its contextualized reasoning and personalized fact-finding, believing that these promote greater tolerance for diversity and greater respect for the "perspectives of the powerless."⁶⁸

Smart has recognized that the qualities and characteristics, which are labeled as "male" or "masculine" by Gilligan, have elsewhere been described as "Western,

⁶⁴ Williams, *Deconstructing Gender*, *supra* note 20, at 801.

⁶⁵ Smart, *Feminist Jurisprudence*, *supra* note 1, at 14.

⁶⁶ *Id.*

⁶⁷ A number of studies have shown results contrary to Gilligan's, and several scholars in her own discipline, developmental psychology, have criticized her method and conclusions. See Deborah Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 625 (1990) (citing RHODE, JUSTICE AND GENDER, *supra* note 20, at 311-12); see also Broughton, *Women's Rationality and Men's Virtues: A Critique of Gender Dualism in Gilligan's Theory of Moral Development*, 50 SOC. RES. 597 (1983) (arguing Gilligan's exaggeration of the masculine-feminine duality in moral development).

⁶⁸ Bartlett, *Feminist Legal Methods*, *supra* note 11, at 849.

imperialist, or 'white' thinking."⁶⁹ Similarly, Joan Williams has argued Gilligan's appropriation of the critique of "possessive individualism" as well as of the critique of traditional Western epistemology.⁷⁰ Finally, Martha Minow has identified the parallel between male and Western cultural perceptions of knowledge.⁷¹

What, then, should we make of Gilligan's seemingly excessive generalizations about women's characteristics, traits, and priorities? Not only did she fail to acknowledge differences that may exist across race, class, sexuality, and ethnicity bases,⁷² as MacKinnon and others have noted, she failed to address the economic, cultural, and social factors which have created the different voice. Perhaps the most productive response to Gilligan's work is to recognize it for what she intended it to be: an empirical study documenting the fact that women may use different criteria and modes of reasoning to make moral decisions than do men, but that this does not necessarily make women inferior to men in any way. It is only when Gilligan's work is projected into a restricting theory that assigns to the "feminine" certain characteristics and to the "masculine" certain other characteristics that it reinforces potentially unhealthy stereotypes for both gender categories. Even if one assumes that the caring ethic has traditionally been the forte' of women, nothing guarantees that it will or should continue to be. The use to which some legal scholars have put Gilligan's theories in the

⁶⁹ *Id.* (citing SANDRA HARDING, *THE SCIENCE QUESTION IN FEMINISM* (1986)).

⁷⁰ Williams, *Deconstructing Gender*, *supra* note 20, at 799-800, 806-809.

⁷¹ See Martha Minow, *Beyond Universality*, 1989 U. CHI. LEGAL F. 115, 131.

⁷² Apparently, she subsequently conducted a similar study with factors such as race and class constituting the variables. See *Feminist Discourse, A Conversation*, *supra* note 15, at 76.

name of feminism may have accurately claimed a limited historical basis. While a critique of law that stems from a relational and caring orientation is valid, continuing to equate that critique with the "feminine" is not only increasingly outdated, it may also be an imprudent and restrictive course for those concerned to better women's situation.

V. RADICAL FEMINISM

Perhaps the primary distinction between radical feminists and relational feminists is that the former are more aware of power disparities between the sexes. In fact, radical feminists generally articulate their theories in terms of gendered hierarchies of power and dominance⁷³ or gender disadvantage,⁷⁴ consistently eschewing any pure sameness-difference discussion as unproductive. As Deborah Rhode has suggested, "[t]he critical issue should not be difference, but the difference difference makes."⁷⁵ While some writers within the radical feminist school are more obviously radical--in the typical sense of the word--than others, the movement itself is radical in the sense that it consistently rejects the orthodoxy of traditional jurispru-

⁷³ See generally MACKINNON, *FEMINIST STATE*, *supra* note 30, at 126-54; MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 30, at 32-45; see also CAROLE PATEMAN, *THE SEXUAL CONTRACT*, ch 1 (1988) (similarly espousing a grand theory based on sexuality; down-playing the differences between women as less significant than the fact they are women).

⁷⁴ See RHODE, *JUSTICE AND GENDER*, *supra* note 20, at 111, 319.

⁷⁵ *Id.* at 313; see also Nicola Lacey, *Feminist Legal Theory Beyond Neutrality*, 48 *CURRENT LEGAL PROBLEMS* 1, 2 (1995) (stating one assumption on which article is based as: "gender has marked an axis of oppression and injustice rather than a mere differentiation.")

dence on all levels and also in the regard that its stance tends to be more overtly political.⁷⁶

Catherine MacKinnon, the doctrine's leading exponent, has called radical feminism the only true feminism--feminism unmodified.⁷⁷ MacKinnon constructs a grand theory--or meta-narrative--that identifies sex as the core of women's oppression and of men's power. In her early classic statement analogizing marxism to feminism, MacKinnon opined that "[s]exuality is to feminism what work is to marxism: that which is most one's own, yet most taken away."⁷⁸ As

⁷⁶ Perhaps this is because radical feminism within jurisprudence/law is grounded in the writings and theories of the 1960s and 1970s radical feminists outside law. See, e.g., SHULAMITH FIRESTONE, *THE DIALECTIC OF SEX* (1970); KATE MILLETT, *SEXUAL POLITICS* (1969). Such radical work, mostly outside the legal discipline, has been carried on in the 1980s by writers such as Andrea Dworkin. See, e.g., ANDREA DWORKIN, *LETTERS FROM A WAR ZONE: WRITINGS 1976-1987* (1988); ANDREA DWORKIN, *INTERCOURSE* (1987). See also generally *RADICAL VOICES* (Renate Klein and Deborah Steinberg eds. 1989); *HESTER EISENSTEIN, CONTEMPORARY FEMINIST THOUGHT* (1984); *POWERS OF DESIRE: THE POLITICS OF SEXUALITY* (Ann Snitow, Christine Stansell, & Sharon Thompson eds 1983); *TAKE BACK THE NIGHT* (Laura Lederer ed. 1980).

⁷⁷ See MACKINNON, *FEMINIST STATE*, *supra* note 30, at 117; MACKINNON, *FEMINISM UNMODIFIED*, *supra* 30, at 15-16.

Although she was almost certainly not the first to posit such, Kate Millett wrote in 1970 that "a disinterested examination of our system of sexual relationship must point out that the situation between the sexes now and throughout history is . . . a relationship of *dominance and oppression*." KATE MILLETT, *SEXUAL POLITICS*, ch. 2, at 25 (1970) (emphasis added).

⁷⁸ Catherine MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 *SIGNS* 515, 515 (1982) [hereinafter MacKinnon, *Agenda for Theory*]. This was subsequently modified somewhat, with the following analogy in MacKinnon's 1989 book:

As work is to marxism, sexuality to feminism is socially constructed yet constructing, universal as activity yet historically specific, jointly comprised of matter and mind. As the organized expropriation of the work of some for the benefit of others defines a class, workers, the organized expropriation of the sexuality of some for the use of others defines sex, woman.

MACKINNON, *FEMINIST STATE*, *supra* note 30, at 3-4.

for the relation of biological sex to socialized gender, MacKinnon sees the former as primary. Gender is essentially the social construction of sexuality, not the other way around.⁷⁹

Although MacKinnon advocates consciousness raising⁸⁰ as the appropriate method by which women can grasp the "reality of women's condition from within the perspective of that experience, not from outside it,"⁸¹ she assumes the collective--that is, that all women have shared the same essential experience(s). Unlike many other feminists, MacKinnon, in her search for a comprehensive explanation for women's oppression and in her quest for an over-arching theory, risks articulating a false consciousness. She essentially maintains that those who disagree with her identification of sex as the situs of oppression do not know "Truth" because they have been unable to discover it within patriarchal society.⁸² Accordingly, although she purports to recognize the significance of other factors, such as race, class and ethnicity,⁸³ her analysis subordinates these factors, as they are trumped by her sex-based theory of gender oppression.

MacKinnon posits that law's purported objectivity is male.⁸⁴ Furthermore, she asserts, "[o]bjectivity is the

⁷⁹ MACKINNON, *FEMINIST STATE*, *supra* note 30, at 111, 113.

⁸⁰ Consciousness raising has elsewhere been defined as "seeking insights and enhanced perspectives through collaborative or interactive engagements with others based upon personal experience and narrative." Bartlett, *Feminist Legal Methods*, *supra* note 11, at 831.

⁸¹ MACKINNON, *FEMINIST STATE*, *supra* note 30, at 121; see also MacKinnon, *Agenda for Theory*, *supra* note 77, at 543.

⁸² See MACKINNON, *FEMINIST STATE*, *supra* note 30, at 115-117.

⁸³ *Id.* at 47-59.

⁸⁴ Furthermore, she defines "male" as "a social and political concept, not a biological attribute, having nothing to do with inherence, preexistence, nature, essence, inevitability, or body as such." *Id.* at 114.

methodological stance of which objectification is the social process."⁸⁵ In turn, sexual objectification subordinates women. MacKinnon's theory is most easily and directly applicable in legal contexts such as obscenity, rape, and reproductive freedom.⁸⁶ However, in presenting her work as meta-narrative, MacKinnon also suggests its role in explaining women's inequality in any and all contexts. She explains the big picture thus:

Inequality because of sex defines and situates women as women. If the sexes were equal, women would not be sexually subjected. Sexual force would be exceptional, consent to sex could be commonly real, and sexually violated women would be believed. If the sexes were equal, women would not be economically subjected, their desperation and marginality cultivated, their enforced dependency exploited sexually or economically. Women would have speech, privacy, authority, respect and more resources than they have now.⁸⁷

Finally, she asserts that women's equality to men will not be scientifically provable until such proof is no longer necessary.⁸⁸

Beyond the initial step of identifying inequality as a matter of dominance and subordination rather than of sameness and difference, MacKinnon advocates constant mindfulness of this reality so that its eventual translation into new doctrinal and jurisprudential conceptions may be achieved.⁸⁹ Once women's concrete reality has been declared, MacKinnon says the next step must be to recognize male forms of power as they are embodied in legal rights for individuals. This would apply differently in various

⁸⁵ *Id.* at 124.

⁸⁶ *See generally id.* at chs. 9, 11.

⁸⁷ *Id.* at 215 (emphasis added).

⁸⁸ *Id.* at 117.

⁸⁹ *Id.* at 243.

legal contexts, but the ultimate goal would be to "qualify or eliminate . . . powers of men [to] use, access, possess, and traffic women and children."⁹⁰

MacKinnon's acknowledgement that advancement for women plays out differently in different contexts is similar to the agenda for research and change of another radical or "disadvantage" feminist, Deborah Rhode. Rhode tends to speak in more moderate terms than does MacKinnon,⁹¹ and she does not embrace MacKinnon's grand theory. Indeed, she eschews such products, calling for "theory without Theory . . . fewer universal frameworks and more contextual analysis."⁹² On the related matter of women's experience, Rhode also departs from MacKinnon in the sense that she recognizes a greater variety of women's lived realities.⁹³

Like MacKinnon, however, Rhode rejects the sameness-difference analysis, opting instead for a realistic assessment of how women's differences may be used against them in legal analysis. Her agenda for reform resembles MacKinnon's in the sense that she encourages going beyond declarations of women's equality to look at strategies for securing women's treatment as equals.⁹⁴ "[A]nalysis should turn on whether legal recognition of gender distinctions is likely to reduce or reinforce gender disparities in power, status, and economic security."⁹⁵

⁹⁰ *Id.* at 245.

⁹¹ See generally RHODE, *JUSTICE AND GENDER*, *supra* note 20.

⁹² *Id.* at 316; see also Rhode, *Feminist Critical Theories*, *supra* note 7, at 619.

⁹³ *Id.* at 318; Rhode, *Feminist Critical Theories*, *supra* note 7, at 621-23; Patterson, *Postmodernism/Feminism*, *supra* note 16; see generally also ZILLAH EISENSTEIN, *THE FEMALE BODY AND THE LAW* (1988); MARTHA MINOW, *MAKING ALL THE DIFFERENCE* (1990).

⁹⁴ RHODE, *JUSTICE AND GENDER*, *supra* note 20, at 319.

⁹⁵ Rhode, *Feminist Critical Theories*, *supra* note 7, at 625; accord generally MACKINNON, *FEMINIST STATE*, *supra* note 30.

VI. THE PUBLIC-PRIVATE DICHOTOMY

Some commentators have found it useful to analyze law's relation to women in terms of the enduring public-private dichotomy, a split that is reflected in life as well as legal thought. Katherine O'Donovan, a leading exponent of this analysis and critic of the dichotomy, uses the terms public and private to refer to distinctions between the aspects of life that are regulated by law and those that are not.⁹⁶ While observing that the boundary between these spheres shifts over time, she argues that the presence of the distinction is significant because it long has been imbued in legal philosophy and informed legal policy.⁹⁷ O'Donovan speculates that the distinction between the two, while not totally static, is unlikely to collapse completely. She nevertheless advocates a union of the two spheres, visualizing such synthesis as a move that, simply speaking, would free both men and women from having to choose between them.⁹⁸

Others have taken a different tack regarding the public-private dichotomy, arguing that it is best seen as reflective of the family-market split and is not perfectly synonymous with the male-female dichotomy, even though there is significant overlap amongst them in Western culture.⁹⁹ Accordingly, even if male-female analysis were

⁹⁶ KATHERINE O'DONOVAN, *SEXUAL DIVISIONS IN LAW* 3 (1985) (acknowledging and discussing other legal definitions of public and private); see also Alan Freeman and Elizabeth Mensch, *The Public-Private Distinction in American Law and Life*, 36 *BUFF. L. REV.* 237 (1987) ("Nothing is more central to our experience in American culture than the split between the public and private.").

⁹⁷ *Id.* at 8. See also Nicola Lacey, *Theory into Practice? Pornography and the Public/Private Dichotomy*, 20 *J. OF LAW & Soc.* 93 (1993); Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 *STAN. L. REV.* 1 (1992).

⁹⁸ *Id.* at 180.

⁹⁹ See Olsen, *Family and Market*, *supra* note 31, at 1499; Dowd, *Work and Family*, *supra* note 31, at 111-112, 118-119.

no longer associated with the market-family dichotomy, the latter would continue to exist. This is very troubling for many feminist legal scholars who object to all dichotomous thinking and who would like to see these categories transcended. These writers, like O'Donovan, advocate greater market-family, public-private interrelation, noting that the structure of each part of the current dichotomy exacerbates the conflict between them, revealing a paradox of sorts when attempts are made to resolve that conflict.¹⁰⁰ Nancy Dowd reveals that paradox, stating

Resolution [of the conflict] depends upon attacking the socially and culturally constructed gender roles that infuse the highly gendered work-family structure. Confronting gender issues is essential But it is not enough.

Dowd advocates elimination of the division of work and family responsibilities on the basis of sex, but she

¹⁰⁰ See Dowd, *Work and Family*, *supra* note 31, at 110-112; Olsen, *Family and Market*, *supra* note 31, at 1578; see also O'DONOVAN, *SEXUAL DIVISIONS*, *supra* note 31; PATEMAN, *SEXUAL CONTRACT*, *supra* note 31, at 10-13.

Ngaire Naffine's explication of the relationship between public and private and the law's attitude toward the legal subject is worth quoting here:

[T]he legal subject [is] someone with a quite specific set of distinguishing characteristics. But these characteristics do not sit easily together. On the one hand our man of law is assumed to be a freestanding, autonomous creature, rationally self-interested and hard-headed; on the other hand he is a being who is assumed both to have and to need access to . . . family values, though he must not display them in his public, legal [] life. The legal person described here is thus essentially a paradox [T]he law assigns to women the job of holding the two worlds together As the courts continue to tell us, the [private] functions are vital and necessary ones, but they are most appropriately performed by dutiful wives and mothers -- not by the man of law. Women's domestic labors sustain the paradox of the man of law.

NGAIRE NAFFINE, *LAW AND THE SEXES*, 148-49 (1990).

recognizes that the social and cultural constructs of employment and parenting roles that rest upon the gender division would not necessarily change the relation between work and family. Nor would they necessarily alter the content of parenting or employment roles. This is because, as Dowd notes, that work-place structure is not solely a consequence of gender but also reflects hierarchies of class and race, the economic and organizational consequences of a post-industrialist advanced capitalist system; and fundamental concepts of the individual, family and community, and their interrelationship with respect to children. Dowd wisely observes that if we stop at gender, we will merely reconstruct gender, reallocating roles, rather than questioning the content of the roles and the structure within which they operate.¹⁰¹ Dowd concludes that society must prioritize neither work nor family, public nor private, but rather should work to restructure the relation between the two.¹⁰²

So, while gender is a key determinant, it is not the sole one of the existing public-private dichotomy within law. Beyond that, however, because it is not strictly a gender issue, an adequate solution to the problems facing women requires that additional issues be addressed in each of these spheres, and that leaves us not far beyond where we started. Still, the public-private doctrine is useful at the point where some theorists conclude that the distinction between the two spheres should be obliterated so that strategies capable of empowering women and of transforming the domestic and public lives of both women and men can be formulated and, eventually, render these concepts unrepresentative or, ultimately, redundant.¹⁰³

¹⁰¹ Dowd, *Work and Family*, *supra* note 31, at 111-112.

¹⁰² *Id.*

¹⁰³ See Morgan, *Legal Theory*, *supra* note 3, at 751 (discussing Olsen, *Family and Market*, *supra* note 31, at 1566-67); Dowd, *Work and Family*, *supra* note 31, at 99-100, 110-112, 171-72.

VII. STANDPOINT/POSITIONAL EPISTEMOLOGY

Several of the methodologies previously discussed have touched upon epistemological issues, implicitly or explicitly expressing doubt about the purported objectivity of traditional jurisprudence. This is reflected in the style of consciousness raising advocated by MacKinnon,¹⁰⁴ as well as in Gilligan's thesis that men and women view the world around them differently. However, not all scholars have relegated epistemology to a secondary issue. Some have focused almost exclusively upon the matter of how knowledge is acquired within legal frameworks and upon the import of this issue when admittedly seeking to compel law's responsiveness to women's needs and problems.

Generally speaking, a feminist epistemology is pro-experience and anti-abstraction; it embraces subjectivity while rejecting dominant ideology's claims to objectivity and universality. Among those feminist legal scholars who have taken up the epistemological torch are Kathleen Lahey, who embraces consciousness raising as a means of producing feminist theory.¹⁰⁵ Lahey has stated that feminist scholarship is about "who may speak for other people and how the appropriation of experience can be legitimated in the process of constructing knowledge."¹⁰⁶ She sees consciousness-raising as a way in which women can generate "moments-of-'knowing'" when the unconscious structures of the mind

¹⁰⁴ As Catherine MacKinnon has written about the importance of epistemology in her search for a feminist theory of the state,

Epistemology and politics emerged as two mutually enforcing sides of the same unequal coin. A theory of the state which was at once social and discrete, conceptual and applied, became possible as the state was seen to participate in the sexual politics of male dominance by enforcing its epistemology through law.

MACKINNON, *FEMINIST STATE*, *supra* note 30, at xi.

¹⁰⁵ Lahey, *Until Women Themselves*, *supra* note 2, at 532.

¹⁰⁶ *Id.* at 525.

are exposed to conscious structures.¹⁰⁷ However, Lahey sees the process of an ongoing struggle, not one capable of producing a "static state of precisely describable and perfectly communicable knowledge."¹⁰⁸ She advocates an open-ended agenda, developed on a small scale with constant referral to women's actual experiences. Lahey acknowledges the ambiguities and uncertainties that characterize the project, but still prefers a modest scale to MacKinnon's Grand Theory approach, which, at some stage risks abandonment of women's lived experience in favor of abstraction.¹⁰⁹

Others, in the MacKinnon mold, have been more dogmatic about their belief in consciousness-raising as *the* method of feminism. These writers have claimed consciousness-raising as the badge that lends validity to feminism because it allows women to take their personal experiences to a political level.¹¹⁰

Ann Scales has also championed consciousness-raising, though her expectations of it are more moderate. She has taken up the issue of legal objectivity and the role that it plays in denying the reality of women's experience. Rather like MacKinnon, Scales sees objectivity as a method-

¹⁰⁷ *Id.* at 532.

¹⁰⁸ *Id.* at 533.

¹⁰⁹ *Id.* at 536.

¹¹⁰ See, e.g., Wishik, *To Question Everything*, *supra* note 3, at 69 (hence the feminist "motto" that "the personal is political"). Related to this is the "story-telling" movement in feminist jurisprudence, the idea being that "outsiders" can inform law and legal scholarship about their perspectives through narrative scholarship, through telling their own stories, as well as those of other marginalized and powerless persons. See, e.g., Jane Baron, *Resistance to Stories*, 67 S.CAL.L.REV. 255 (1994) (collecting articles); see also Martha Minow and Elizabeth V. Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37, 52 (1988) ("[E]ach human being is unavoidably situated in his or her own experience There is a real risk of imposing one's own perspective by claiming already to be impartial and objective").

ological stance that is conducive to objectification of women. Also tracking MacKinnon, Scales advocates consciousness-raising as methodology, insisting that experience is the most accurate expression of truth and that it can provide law with "dramatic eye-witness testimony."¹¹¹ However, it is Gilligan's theories on which Scales builds when she argues that objectification is part of the masculine consciousness. As a psychological phenomenon, it is therefore more powerful than mere objectivity in the cultural sense because it celebrates the masculine existence and consciousness. Still, Scales does not equate the rejection of objectivity with the rejection of standards and "truths." In order to discern appropriate standards and truths, she advocates continuous evaluation of results and continuous self-critique of feminist jurisprudence, along with the current critique of traditional jurisprudence. She rejects a *a priori* abstract concepts which prevail regardless of actual results.

Scales' result-orientation, however, lulls her into a familiar feminist pitfall: the failure to account for heterogeneity of women. Her theory presumes that certain "truths" are obtainable and that feminists can reach consensus about what a good standard or "truth" is. As other analyses have borne witness, this is usually easier said than done.

Katharine Bartlett has more recently articulated an interesting modification of the sort of "standpoint epistemology" represented by consciousness-raising.¹¹² She advocates a method, which she calls positionality, that admits its point of view but that is not static and does not state gender as the essential category of analysis. Bartlett's positionality concept retains a bit of the knowledge-based-upon-experience approach. It rejects,

¹¹¹ Scales, *Emergence of Feminist Jurisprudence*, *supra* note 62, at 1402.

¹¹² Bartlett, *Feminist Legal Methods*, *supra* note 11.

however, the dominant view of truth as external and objective, opting instead for a "situated and partial" view of truth that emerges from one's involvements and relationships.¹¹³ We must seek to expand our limited perspectives as individuals and to expand sources of identity so that we avoid imposition of our (feminism's) point of view upon the world and of making gender analysis essential. Bartlett believes that from the critical process, certain increasingly final and fixed truths will emerge. However, we must be cautious not to try to identify too many "truths," not to be too lax in our criticism of the substance of such "truths," and not to defend them too dogmatically.¹¹⁴

She summarizes her position:

Positionality is a stance from which a number of apparently inconsistent feminist "truths" make sense. The positional stance acknowledges the existence of empirical truths, values and knowledge, and also their contingency. It thereby provides a basis for feminist commitment and political action, but views these commitments as provisional and subject to further critical evaluation and revision.¹¹⁵

Bartlett seems to be trying to overcome one of the recurring paradoxes of feminist jurisprudence--specifically of feminist methodology: the conflict between an epistemology that seeks to accommodate, validate, and affirm every *individual* woman's experience while also seeking some *common* ground--some common "truths"--upon which to construct a new jurisprudence that accounts for their experience(s). She evidently believes that a positional methodology can reconcile the apparent contradiction between the value in recognizing diversity and the need to attempt a

¹¹³ *Id.* at 990; see also Williams, *Feminist Legal Epistemology*, 8 BERKELEY WOMEN'S L.J. 63-68-72 (1993).

¹¹⁴ *Id.* at 883-84.

¹¹⁵ *Id.* at 880.

transcension of that diversity.¹¹⁶ In this sense, I believe Bartlett's work signals a more mature feminist jurisprudence. Gone are the essentialism, dogmatism, and absolutism of some earlier works, perhaps to be replaced by a method which recognizes the importance of gender, while also acknowledging that its significance may vary from one legal context to another and also may shift over time and from one legal system to another. The test of Bartlett's methodology may now be whether law as a discipline is capable of sufficient flexibility and responsiveness to appreciate and integrate such complex and transient viewpoints.

VIII. REALISM, SOCIETY AND LAW

The proponent of a different methodology, which she has labeled "women's law," is Norwegian lawyer and academic, Tove Stang Dahl.¹¹⁷ Although her analysis is not generated from the context of law or the state and does not address issues of power, she speaks in terms of a women's justice that will evolve, eventually permeating law at the levels where she perceives law operating in women's lives--mostly in the administrative and regulatory spheres. She argues that the way to modify the existing law is to focus upon legislation and legal practice, bringing to bear methods of social science in their formulation.¹¹⁸

This approach to feminist jurisprudence, like the method of consciousness raising discussed above, is realist in methodology and nature, presuming that the basis of the critique must be women's lived experience. However, unlike those focused on consciousness raising as a means of formulating a feminist agenda, this approach commences at

¹¹⁶ See *id.* at 885.

¹¹⁷ See generally DAHL, *WOMEN'S LAW*, *supra* note 33; Dahl, *Taking Women as a Starting Point*, *supra* note 33.

¹¹⁸ Dahl, *Taking Women as a Starting Point*, *supra* note 33, at 240-41.

the point where women are--not where feminists are. It is content with women's consciousness. From this starting point, Stang Dahl argues that women's concerns and needs should inform the development of new areas of law--or at least the reclassification of existing categories, including birth law, paid-work law, housewives' law, and money law.¹¹⁹ Dahl assumes the existence of a consensus that supports her moral stance, one that focuses upon freedom, equality, dignity, integrity, self-determination and self-realization for women.¹²⁰ Like others, Dahl only cursorily addresses the meaning of such terms as "women" and "experience," seeming thereby to ignore their complexity. She assumes that some unifying women's experience can be discovered, and that "women" is a concrete, knowable category. Implicitly, then, she ignores the heterogeneity within gendered experience.

Dahl offers no apology for the presence of women-centered policy considerations at the heart of women's law. In fact, she recognizes the value of exchange between the feminist political stance and women's studies as a science, as the former informs the direction of the latter. Unlike most other feminist jurisprudential thinkers, however, she expresses faith in a true distinction between the two, stating that science's primary mission is to seek knowledge and understanding, which in turn influences the women's movement.

IX. SOCIAL INJURY APPROACH

Related to Dahl's theory in the sense that it speaks in terms of justice is the social injury or harm approach espoused by a number of feminist legal scholars. Several writers--including MacKinnon,¹²¹ Wishik,¹²² West,¹²³ and

¹¹⁹ *Id.* at 242.

¹²⁰ *Id.* at 244-45.

¹²¹ See MACKINNON, *FEMINIST STATE*, *supra* note 30, at 195-214 (in pornography context).

Matsuda¹²⁴--have touched on this matter in their work. Working to some extent within orthodox legal concepts, this method still challenges the primacy of legal liberalism's rights-based analysis, shifting the emphasis to social injury or harms which may occur when some members of society exercise their "rights." One example of this analysis can be seen in MacKinnon's work on sexual harassment, activity that is now recognized as a harm within the U.S. civil rights laws.¹²⁵ This strategy is increasingly applied in the context of free speech, as women and other groups seek to establish and have legally recognized the harm that may be caused to women when someone exercises his or her constitutional right to free speech.¹²⁶

¹²² See generally Wishik, *To Question Everything*, *supra* note 3.

¹²³ West has argued that the law generally recognizes harms to women only when they are analogous to harms which deprive a right that is comprehensible to masculine liberal jurisprudence. See West, *Jurisprudence and Gender*, *supra* note 13, at 58-59.

¹²⁴ See *infra* sources cited at note 129.

¹²⁵ See generally MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 30, at 103-116.

Mark Kelman, a well-known scholar within the American Critical Legal Studies movement, has commented upon the harm concept in this context.

A woman may ultimately be just as abused and exploited by the sexual harasser as the rapist; the fact that the sexual harasser so closely resembles the boss in his ordinary mode . . . should ultimately be used by radicals to undermine the legitimacy of power, not to defend harassers as obviously noncriminal.

Mark Kelman, *Criminal law: the origins of crime and criminal violence*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (David Kairys ed. 1982).

¹²⁶ See MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 30, at 127-213 (discussing harm in context of pornography); Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989) (extremist/sexist speech context); Mari Matsuda, *Language as Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation*, 37 BUFF. L. REV. 337 (1988) (group defamation context).

Adrian Howe has focused on the social injury approach, articulating a theory of social injury, originating in that concept's use in criminology but excising it from that context and developing it in one that illustrates its relevance to women.¹²⁷ She suggests an analytical privilege for the "concept of social injury--in particular, the concept of gender-specific injury--within feminist legal theory and, ultimately, legal discourse."¹²⁸ As she notes, once we have decided that the law is an appropriate arena for change, we need to speak in legally cognizable, legally actionable terms.¹²⁹ She advocates the identification and politicization of "hidden injuries" that occur in our gender-ordered society,¹³⁰ concluding that redress for such gender specific injuries must be provided in any valid jurisprudence of social justice.¹³¹

While Howe's work is pragmatic in its utilization of traditional legal concepts, this may also be one of its disadvantages. Her theory may go only part of the way in the feminist jurisprudence attempt to improve women's situation within law and by means of law. This is because identifying a social injury is not the same as establishing a legally cognizable one. Just because a harm is identified does not guarantee legal recognition of its causal link to the objectionable activities which feminist believe should be restricted or prohibited.¹³² Furthermore, unless

¹²⁷ Adrian Howe, 'Social Injury' Revisited: Towards a Feminist Theory of Social Justice, 14 INT'L J. OF SOCIOLOGY OF LAW 423 (1987).

¹²⁸ *Id.* at 432.

¹²⁹ *Id.*

¹³⁰ *Id.* at 433.

¹³¹ *Id.* at 434.

¹³² See generally Frederick Schauer, *Mrs. Palsgraf and the First Amendment*, 47 WASH. & LEE L.REV. 161 (1990); Frederick Schauer, *Causation Theory and the Causes of Sexual Violence*, 1987 AM. BAR FOUND. RES. J. 737.

the law deems a harm or injury sufficiently serious, it is highly unlikely that exercise of the "right" from which the harm results will be circumscribed by law. Traditionally, little import has been given by *man-made* law to women-specific harms, and unless a radical overhaul occurs in the judiciary and legislatures, this is unlikely to change.

Accordingly, feminist work within the social injury realm may be useful with regard to some issues and at some stages of the project. However, there is no real prospect of compelling law to recognize perhaps the most insidious of harms--women's overall socialization as inferior to men. The prospect of legal restraint of the myriad causes of such a widespread and subtle harm is virtually impossible.¹³³

X. CONCLUSION

Each of the approaches to feminist jurisprudence discussed above has made valuable contributions to the development of a more sophisticated discipline than perhaps we could have envisioned a decade ago. While many commentators have focused on divisions among various factions of feminists, they often have failed to realize how the critique within feminism and feminist "theory" has generated a net positive effect. As feminist jurisprudence has matured, new analyses have revealed not only the flaws in traditional jurisprudence, but also the flaws in preceding feminist theories. As a particular new analysis has rendered aspects of a previous one obsolete and revealed the paradoxes within it, feminist jurisprudence has been

¹³³ This, of course, assumes that law is an appropriate forum for change. Some writers, most notably Carol Smart, have long questioned the wisdom of that basic proposition and, so would reject outright Howe's analysis. See Smart, *Feminist Jurisprudence*, *supra* note 1, at 17-18; Smart, *Feminism and Law: Some Problems of Analysis and Strategy*, 14 INT'L J. OF SOC'Y OF LAW 109 (1986); see also Minow, *Law Turning Outward*, 73 TELOS 79 (1986) (contemplating whether "law deserves a privileged place in resolving conflict and ordering society").

refined and thus gained strength as a critique of the dominant ideology.

Several transitions from one analysis to another are illustrative of this regenerative phenomenon. Although the "women and the law" approach which commenced the movement has been much maligned, its import to the early development of feminist jurisprudence can hardly be overstated. Without this initial step to raise women's visibility and provoke discussion about equality issues, the dead-end of the sameness-difference debate would not have been exposed. Moreover, absent the frustration evoked by that debate, scholars such as MacKinnon and Rhode would not have developed their dominance/disadvantage theses. Just as a gendered analysis revealed the historical inappropriateness--and imminent obsolescence--of law's public-private dichotomy, recent commentators such as Joan Williams and Katharine Bartlett are foretelling the coming redundancy of a gendered analysis.¹³⁴ The critiques of minority and lesbian feminists have revealed the danger of establishing gender as the essential situs of oppression, while also illustrating the real need for inclusion.¹³⁵ Similarly, the false consciousness difficulty with MacKinnon's meta-narrative would not have been revealed but for other feminists' recognition of women's heterogeneity and corresponding variety of lived experiences. On the other hand, what would unify women sufficiently to build any theory without MacKinnon's identification of and exposition about

¹³⁴ See *supra* Sect. VII and accompanying text (discussing standpoint epistemology and positionality).

¹³⁵ See generally, e.g., Regina Austin, *Sapphire Bound!*, 1989 WISC. WOMEN'S L. REV. 536; Cain, *Grounding the Theories*, *supra* note 2; Cherise Cox, *Anything Less is Not Feminism: Racial Difference and the W.M.W.M.*, 1 LAW & CRITIQUE 237 (1990); Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Marlee Kline, *Race, Racism, and Feminist Legal Theory*, 12 HARV. WOMEN'S L.J. 115 (1989); Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L.REV. 9 (1989).

the common denominator that sex--along with the socialized gender that follows from it--represents?

Many other examples could be listed, but the point is made. Feminist jurisprudence has evolved through a series of transitions, just as it should and will continue to do. A vigilantly self-critical stance should be maintained as the next phase is entered. Feminist jurisprudence should remain the object of efforts to "reappraise, deconstruct, and transform,"¹³⁶ just as it makes traditional jurisprudence the object of its reappraisal, deconstruction and transformation.

The gender issue is indeed important, and it has been ignored for too long. But, what will be the end result of developing a feminist jurisprudence that takes into account solely this factor? If knowledge from a feminist standpoint obscures or precludes knowledge from a working-class or racial minority standpoint,¹³⁷ how can we wholeheartedly embrace it as the new norm we have sought? Still, "feminists must use presently understandable categories, even while maintaining a critical posture toward their use," the dichotomies they represent,¹³⁸ and the potentiality of a counter-productive essentialism. While it is troubling to offer legal remedies based upon the very categories that have contributed to the harm being redressed, it would be imprudent wholly to reject such categories now, when we've come only so far.

Joan Williams has argued that our goal is not necessarily gender-neutrality. Rather, it is to de-institution-

¹³⁶ Bartlett, *Feminist Legal Methods*, supra note 11, at 887.

¹³⁷ See Maureen Cain, *Realism, Feminism, Methodology, and Law*, 14 INT'L J. OF SOC'Y OF LAW 255 (1986).

¹³⁸ Bartlett, *Feminist Legal Methods*, supra note 11, at 835.

alize gender.¹³⁹ For if we advocate gender neutrality (or gender difference) across the board, we risk leaving women in a worse position than they previously experienced. Thus, the importance of contextual examination and context-specific solutions becomes apparent. Within contextual analysis, political and social conditions of place and time are necessary considerations,¹⁴⁰ for only through looking to the realities of women's lives at a given moment can we determine standards and truths and, in turn, formulate responsive rules. Even if these standards, truths, and rules are admittedly tentative and partial, we may feel some confidence in them as the best solution at that moment.

Perhaps it is the appropriate destiny of feminist jurisprudence to continue to function as critique rather than to form a whole new normative vision of law and jurisprudence. As Deborah Rhode has written, "our analysis can become more self-critical about the partiality of our understandings and more explicit about the values underlying them."¹⁴¹ For eventually, when women's views, concerns, and experiences have been recognized by and integrated into mainstream legal philosophy, the notion of a feminist jurisprudence will have been rendered redundant.

¹³⁹ Williams, *Deconstructing Gender*, *supra* note 20, at 836-41 (citing Alison Jagger, *On Sexual Equality*, 84 ETHICS 275, 276 (1975)).

¹⁴⁰ See generally, Suzanne Gibson, *Continental Drift: The Question of Context in Feminist Jurisprudence*, 1 LAW & CRITIQUE 173 (1990) (discussing the extent to which feminist legal theories may be traded across jurisdictions).

¹⁴¹ RHODE, JUSTICE AND GENDER, *supra* note 20, at 320.

A Gendered Analysis of the Law Regarding Extremist Speech

I. INTRODUCTION

More than with any other invocation of the free speech principle, the question of what, if anything, should be done to curtail so-called extremist, hate, or assaultive speech has challenged the preeminence of the principle. Hate speech is one of the most controversial issues faced by liberal democracies that espouse a free speech tenet. In very recent years, it has become more than a favoured topic of heated academic debate between the libertarians and those willing to countenance some restriction of hateful speech. It has also increasingly become a subject for federal court consideration in the United States, as the so-called "politically correct" movement has swept the country's campuses, and a number of universities have adopted codes prohibiting and penalizing such offensive speech.¹ Often ignored -- or at least minimized -- in

¹ See Wilson, *Anti-Harassment Policies Bring Controversy over Free-Speech Issues*, Chronicle of Higher Educ., Oct. 4, 1989, at A1, col. 1 (as of the writing of the article, nine state institutions and perhaps as many private colleges and universities, had adopted or were considering restrictions on hateful speech directed at historically disadvantaged factions); *Academics debate whether it's right to be 'politically correct'*, The Dallas Morning News, April 21, 1991, at 1J; Bernard Levin, *Portrait of a harassed lady*, The Times (London), November 25, 1991; *Take Care*, The Economist, February 10, 1991. See also Doe v. University of Michigan, 721 F.Supp. 852 (E.D. Mich. 1989), noted in 103 HARV. L. REV. 1397 (1990).

See generally MARI MATSUDA, CHARLES LAWRENCE III, RICHARD DELGADO, KIMBERLE W. CRENSHAW, WORDS THAT WOUND (1993) [hereinafter WORDS THAT WOUND]; Gerald Gunther, *Good Speech, Bad Speech: Should Universities Restrict Expression that is Racist or Otherwise Denigrating?*, 42 STAN.L.REV. 4 (1990); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Alison G. Myhra, *The Hate Speech Conundrum and the Public Schools*, 68 N.D.L.REV. 71 (1992); Ronald Rychlak, *Civil Rights, Confeder-*

media reports of such matters is the escalation in ethno-violence on U.S. college campuses over the past decade, the manifestations of ethnic hate to which these codes have sought to respond. A 1990 report by the National Institute Against Prejudice and Violence found that between 65 and 70% of the nation's minority students reported some form of ethno-violent harassment.²

Key U.S. Supreme Court decisions on hate speech include 1992 and 1993 cases holding unconstitutional a city ordinance punishing hate crimes³ but upholding enhancement of a sentence imposed for a crime when the perpetrator chose his victim on the basis of race.⁴

Traditionally, debate about extremist speech has arisen from racially hateful or, only in England and to a lesser extent in recent years, blasphemous speech. Extremist speech that is offensive because it is sexually hateful, or that denigrates or demeans based on gender,⁵ has

ate Flags, and Political Correctness: Free Speech and Race Relations on Campus, 66 TUL.L.REV. 1411 (1992); Robert Sedler, *The Unconstitutionality of Campus Bans on "Racist Speech": The View from Without and Within*, 53 U.PITT.L. REV. 631 (1992); Suzanna Sherry, *Speaking of Virtue: A Republican Approach to University Regulation of Hate Speech*, 75 MINN. L. REV. 933 (1991); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal*, 1990 DUKE L.J. 484; Note, *Regulating Speech on Campus: A Plea for Tolerance*, 26 WAKE FOREST L. REV. 1349 (1991).

² National Institute Against Prejudice & Violence, Institute Report No. 4, March 5, 1990.

³ *R.A.V. v. City of St. Paul*, 112 S.Ct. 2358 (1992) (ordinance prohibiting the use of "'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender'" struck down as violating rule against content-based discrimination).

⁴ *Wisconsin v. Mitchell*, 113 S.Ct. 2194 (1993), discussed in Ian Loveland, *Hate Crime and the First Amendment*, 1994 PUBLIC LAW 174.

⁵ While my intuition tells me that this expression does not need further definition, one commentator writing about what she calls "sexist speech" has defined it as including the following: "(1) speech demanding or requesting sexual relationships; (2) sexually explicit speech

aroused far less concern and received far less attention. Indeed, until quite recently, slurs about and against women--as women--seem to have been expected and accepted, even if in bad taste in polite company. Academic books and germinal articles on the topic of "extremist" or "offensive" speech have, with few exceptions and then only recently,⁶ not contemplated the harms and consequences of misogynist comments. The concern shared by both those who would proscribe racist speech and those who would not (excepting, one supposes, the extreme right-wing factions

directed at the woman; (3) degrading speech directed at the woman; (4) sexually explicit or degrading speech that the woman knows exists in the workplace, even though it is not directed at her." Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1, 7 (1990) [hereinafter Strauss, *Workplace*].

Consider also Cynthia Bowman's definition of "street harassment", which represents one sub-category of misogynist speech:

It includes both verbal and nonverbal behavior, such as 'wolf whistles, leers, winks, grabs, pinches, catcalls and street remarks'; the remarks are frequently sexual in nature and comment evaluatively on a woman's physical appearance or on her presence in public. The comments range from 'Hello, baby' to vulgar suggestions and outright threats, such as 'fucking bitch, fucking cunt', '[w]hite whore', or 'your're just a piece of meat to me, bitch.'

Bowman, *Street Harassment*, *infra* note 7, at 523 (footnotes omitted).

As illustrated by the Bowman examples, most verbal attacks on women refer to them in sexual terms, frequently even as body parts. One researcher has noted that roughly one thousand words and phrases refer to women in a sexually derogatory manner; the largest category of words that degrade in sexual terms are female specific. Schultz, *The Semantic Derogation of Women*, in LANGUAGE AND SEX: DIFFERENCE AND DOMINANCE 64, 71-72 (B. Thorne & N. Henley eds. 1975); see also JANE MILLS, *WOMANWORDS* (1989); C. MILLER & K. SWIFT, *WORDS AND WOMEN*, 109 (1977).

⁶ See, e.g., Bowman, *Street Harassment*, *infra* note 7; Keith Fentonmiller, *Verbal Sexual Harassment as Equality Depriving Conduct*, 27 U. MICH. J. OF LAW REFORM, 565 (1994)[hereinafter Fentonmiller, *Verbal Harassment as Equality Depriving Conduct*]; Rodney Smolla, *Rethinking First Amendment Assumptions about Racist and Sexist Speech*, 47 WASH. & LEE L.REV. 171 (1990).

who are often responsible for racist speech), is that the speech may have long-term, diffuse effects on popular attitudes toward ethnic and other minority groups targeted by it. Both libertarians and those who seek some limitation on offensive speech generally agree on the desirability of reforming public opinion in order to eliminate or at least reduce prejudice against such groups. These two factions disagree, however, on whether proscription of such speech is the most effective or most appropriate way to achieve those ends. The same concerns translate to the gender sphere. Increasingly, feminists and others concerned about the enduring harms to women have begun to question the power of such sexually hateful speech to construct or at least advance socially damaging attitudes towards women, as well as to cause more tangible forms of discrimination, victimization, and criminal activity that stem from those attitudes.⁷

II. Free Speech Theory

One can hardly engage in a meaningful discussion about hateful speech and its regulation without discussing the theories that underpin the free speech principle in American and English jurisprudence. Both courts and political

⁷ See, e.g., Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517 (1993) [Bowman, *Street Harassment*]; Fentonmiller, *Verbal Harassment as Equality Depriving Conduct*, supra note 6; Alon Harel, *Bigotry, Pornography, and the First Amendment: A Theory of Unprotected Speech*, 65 S.CAL.L.REV. 1887 (1992) [hereinafter Harel, *A Theory of Unprotected Speech*]; Amy Horton, (Comment) *Of Supervision, Centerfolds, and Censorship: Sexual Harassment, the First Amendment, and the Contours of Title VII*, 46 U. MIAMI L. REV. 403 (1991); Susan Williams, *Feminist Jurisprudence and Free Speech Theory*, 68 TUL. L. REV. 1563 (1994); Thomas Kelven, *Free Speech and the Struggle for Power*, 9 N.Y.L.SCH.J.HUM.RTS. 315 (1992) [hereinafter Kelven, *Struggle for Power*]; Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 U.C.L.A. L.REV. 1791 (1992) [Volokh, *Workplace Harassment*]; STAFF OF SENATE COMM. ON THE JUDICIARY, 102d Congress, 2d Session, *VIOLENCE AGAINST WOMEN: A WEEK IN THE LIFE OF AMERICA 7* (Comm. Print 1992) [hereinafter *A WEEK IN THE LIFE OF AMERICA*].

philosophers have espoused various theories to support a free speech principle, and these have been further refined as they have been relied upon to interpret the First Amendment to the U.S. constitution. The labels as well as the delineations amongst the theories vary, but they are essentially these: the marketplace-of-ideas justification; the tolerance or social stability theory; the argument from democracy; and the self-realization theory.

Briefly, the "marketplace of ideas" theory (also known as the discovery-of-truth justification) holds that freedom of speech enables a populace to determine "truth".⁸ Justice Holmes once expressed it this way: "The best test of truth is the power of the thought to get itself accepted in the competition of the market."⁹ If the state suppresses some communications because it believes them to be false, the argument goes, it may in fact be eliminating from the market-place some true or partly true ideas. Further, even a completely false idea may prompt re-examination of assumptions, a process that serves to stimulate

⁸ See J. MILTON, *AEROPAGITICA* (Richard Jebb ed., 1918) ("Let [Truth] and falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?"); J.S. MILL, *ON LIBERTY* (Everyman ed. 1972) [hereinafter MILL, *ON LIBERTY*]; see generally KENT GREENAWALT, *SPEECH, CRIME AND THE USES OF LANGUAGE*, ch. I(2) (1989) [hereinafter GREENAWALT, *USES OF LANGUAGE*]; EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH*, ch. 1 (1989) [hereinafter BAKER, *HUMAN LIBERTY*]; ERIC BARENDT, *FREEDOM OF SPEECH* 8-13 (1985); Thomas Emerson, *Colonial Intentions and Current Realities of the First Amendment*, 125 PA.L.REV. 737 (1977); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L. J. 1, 25; Kenneth Lasson, *Racial Defamation as Free Speech: Abusing the First Amendment*, 17 COLUM. HUMAN RTS. L. REV. 11, 21-22 (1985) [hereinafter Lasson, *Abusing the First Amendment*] (noting Thomas Jefferson's libertarian view on speech that the best way to deal with error is to permit its correction by truth).

Kent Greenawalt more clearly differentiates between the truth discovery rationale and the marketplace of ideas theory, considering the latter, at best, an incomplete version of the former. GREENAWALT, *USES OF LANGUAGE*, *supra* at 34.

⁹ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

or magnify the truth. For John Stuart Mill, who was an early advocate of this rationale for a free speech principle, truth is a broad concept, not limited to empirical facts but extending to judgments regarding values as well. As one might anticipate, the truth-discovery justification has been criticized on several grounds, the primary ones being that "objective truth" does not exist; that the reality of "free" discussion actually impedes an open market of ideas; that the discernment of truth may be a lengthy process; and that "truth", in the sense achieved in the marketplace, is simply what the majority thinks it is at any given time.

A second rationale often articulated in support of free speech is that it promotes tolerance amongst diverse people and therefore fosters social stability.¹⁰ This justification seems particularly appropriate in a heterogeneous nation such as the United States, (and increasingly Western European nations, as well) where the pluralistic society needs to accommodate so many different cultures. One flaw of the theory is that the ostensibly tolerant stance may disguise the extent to which diversity is suppressed rather than permitted; after all, the degree of tolerance is determined by the dominant culture and thus reflects the values of that culture.¹¹

The argument from democracy, the third broad category of justification, holds that free speech is vital to

¹⁰ See generally GREENAWALT, *USES OF LANGUAGE*, *supra* note 8, at 24-26; LEE BOLLINGER, *THE TOLERANT SOCIETY* (1986); Paul G. Stern, *A Pluralistic Reading of the First Amendment and Its Relation to Public Discourse*, 99 *YALE L. J.* 925 (1990) [hereinafter Stern, *Pluralistic Reading of the First Amendment*].

¹¹ Nitya Duclos, *Lessons of Difference: Feminist Theory on Cultural Diversity*, 38 *BUFFALO L.REV.* 325, 371 (1990); see also Robert Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 *HARV. L. REV.* 601, 626-45 (1990); Robert Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 *CAL. L. REV.* 297, 299-305 (1988).

democracy because citizens must be well-informed and exposed to competing arguments in order to make necessary decisions about the functioning of the government.¹² Freedom of speech is conceived as a condition of the exercise of political liberty. As Alexander Meiklejohn wrote, the issue is not so much freedom to speak; rather the First Amendment "protects the freedom of those activities of thought and communication by which we 'govern.'"¹³ This justification may, at first glance, appear at least to be more clear-cut than the others. Further consideration, however, raises concern over the determination of what is and what is not "political" speech, and therefore worthy of protection under this theory. While this theory seems consistent with suppression of criminal speech, libel, obscenity and various other categories, it would not protect the vast range of speech (e.g., artistic expression) which, while not truly "political", we may intuitively desire to protect.¹⁴

A fourth rationale for a free speech principle is that which views as crucial communication's contribution to individual self-fulfillment.¹⁵ This justification posits

¹² See generally ERIC BARENDT, *FREEDOM OF SPEECH* 20 (1985); Lasson, *Abusing the First Amendment*, *supra* note 8, at 22-23; Stern, *Pluralistic Reading of the First Amendment*, *supra* note 10, at 927, 929-33.p2237Y

¹³ Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255. See also Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26 (1971) (only "the discovery and spread of political truth" provides a justifiable basis for judicial intervention to protect speech).

¹⁴ But see Harel, *A Theory of Unprotected Speech*, *supra* note 7, at 2 ("political discourse is the tool with which our political obligations are established. The function determines its boundaries. Political discourse extends only to those ideas and values that can legitimately play a role in the determination of our political obligations.").

¹⁵ See generally GREENAWALT, *USES OF LANGUAGE*, *supra* note 8, at 27-28; THOMAS EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6 (1970); ERIC BARENDT, *FREEDOM OF SPEECH*, 14-20 (1985); Stern,

that freedom to say or write what one pleases--even if it is deviant from the mainstream and perhaps even more importantly if that is the case--is critical to an individual's personal development. Of course, one could also argue that an individual's freedom to do as he or she pleases is just as important as the freedom to say what he or she pleases, but such a principle presumably would lead to anarchy. The standard rebuttal to the self-fulfillment argument is that communication stems directly from one's thoughts and feelings so that its suppression is a more immediate stricture on one's personality. Additionally, the likelihood that direct harm will result from "deviant" speech has been considered to be much less than the likelihood it will result from deviant activity.¹⁶

III. The Conflict with Equality

As with obscenity law, it is in discussing racially and sexually hateful speech that the free speech principle is arguably in direct conflict with another prominent Western value: equality.¹⁷ Feminists have worked in

Pluralistic Reading of First Amendment, supra note 10, at 926-27; but see Frederick Schauer, Speech and "Speech" -- Obscenity and "Obscenity: An Exercise in the Interpretation of Constitutional Language 67 GEO. L.J. 889, 910-15 (1979) (stating that freedom of speech is not just a subset of a broader notion of liberty; individualism is not its basis).

¹⁶ *But see Bowman, Street Harassment, supra note 7, at 534-42 (discussing the "legally cognizable" harms of street harassment, which author characterizes as action but which is also speech); Patricia Williams, Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism, 42 U. MIAMI L. REV. 127 (1989) ("The attempt to split bias from violence has been [U.S.] society's most enduring rationalization.").*

¹⁷ For an excellent discussion of this conflict between rights and equality in the pornography context, see Rae Langton, *Whose Right? Ronald Dworkin, Women, and Pornographers*, 19 PHIL. & PUBLIC AFFAIRS (4) (1990); see also CATHARINE MACKINNON, *ONLY WORDS*, Chapter 3 (1993); Bowman, *Street Harassment, supra note 7, at 540-48 (discussing how street harassment and attendant fear of assault limits the*

recent years to reveal and illuminate this conflict, to show the harms certain types of speech cause to women, however "diffuse" and arguably indirect they may be.¹⁸ One of the ways that such speech harms women is in its undermining of their quest for equality.¹⁹

Although in the United States, equality is guaranteed by the Fourteenth Amendment to the Constitution, neither the law of equal protection based on that amendment nor First Amendment jurisprudence has shown any real sensitivity "to the damage done to social equality by expressive means"; nor has it been judicially recognized that "some people get a lot more speech than others."²⁰ Catharine MacKinnon, among others, has offered observations regarding the relationship between these two issues, noting "the less speech you have the more the speech of those who have it keeps you unequal; the more the speech of the dominant is protected, the more dominant they become and the less the subordinated are heard from" Most cases dealing with speech issues take up the First Amendment first--and last--rarely acknowledging the relevance of the Fourteenth Amendment and the equality implications of these cases. As a consequence, "pornography ordinances and hate crime provisions fail constitutional scrutiny that they might,

equality women theoretically enjoy); Fentonmiller, *Verbal Harassment as Equality Depriving Conduct*, *supra* note 6, at 573-82.

¹⁸ Some civil rights activists and scholars have also worked to bring this conflict to the forefront in their work on behalf of ethnic and racial minorities. See, e.g., MATSUDA, ET AL., *WORDS THAT WOUND*, *supra* note 1. In the 1989 case of *Doe v. University of Michigan*, 721 F.Supp. 852, 853 (E.D. Mich. 1989), the court began its opinion with a rare admission of this conflict: "It is an unfortunate fact of our constitutional system that the ideals of freedom and equality are often in conflict."

¹⁹ See *infra* Sect. VI (A).

²⁰ CATHARINE MACKINNON, *ONLY WORDS* 72 (1993).

with constitutional equality support, survive."²¹ Indeed, until feminists framed pornography (as opposed to obscenity) as an equality issue such that the federal judiciary was compelled to consider it as such,²² the only acknowledged intersection of equality theory was with its ban on content-based regulation: "government may not grant the use of a forum to people whose views it finds acceptable, but deny it to those wishing to express less favored or more controversial views."²³

One great obstacle to legal recognition of the harm hate speech causes women (and, arguably, also men) -- one aspect of that harm being this subversion of equality -- has been the traditional legal view of causation. Law's conception of causation is a particularly narrow and linear one that has failed to recognize that the sexual caste system that still prevails in Western society is complex and multi-dimensional. Supporting that caste system and impeding authentic sexual justice is a legal system that permits (some would say encourages) hate speech, speech that frightens women and therefore restricts their mobility, undermines their self-esteem and inhibits their own speech, and discourages their full participation in public affairs and the state. By maintaining that misogynist speech (like racist speech) "causes" no harm,²⁴ some West-

²¹ *Id.* at 85; see also Williams, *Feminist Jurisprudence and Free Speech Theory*, *supra* note 7 (arguing that if society made a commitment to meaningful gender equality, we would not be facing the suppression of hate speech).

²² *American Booksellers, Inc. v. Hudnut*, 771 F. 2d 323 (7th Cir. 1985), *aff'd without opinion* 475 U.S. 1001 (1986).

²³ *Police Department v. Mosley*, 408 U.S. 92, 96 (1972); see also Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 UNIVERSITY OF CHICAGO L. REV. 20 (1975).

²⁴ That is, it does not cause any direct harm unless it leads immediately to violence, as discussed *infra* at Sect. VI. The law recognizes no other direct harms, worthy of legal redress, resulting from the speech.

ern legal systems have rationalized their decision to permit it. As more fully discussed below at Section VI (A), this ignores very real diffuse harms that flow from such speech, and it does so at a particularly high cost to equality.

Hate speech has a crippling effect on many -- indeed, probably most -- women. Vulgar and offensive epithets, like pornographic representations of women's degradation, derive their power to wound from their meaning and from "the disgust and violence they express phonetically"²⁵ and, in the case of pornography, pictorially. The psychic wounds they inflict can be debilitating -- at least momentarily and often over the longer term as well -- to a recipient/victim/hearer, just as a gunshot or knife wound inflicted by an assailant can be debilitating, albeit in a different way.²⁶ To avoid hearing hate messages, victims may "quit jobs, forgo education, leave their homes, avoid certain public places, curtail their own exercise of speech rights, and otherwise modify their behavior and demeanor."²⁷ However you look at it, hate speech can be hard to combat with more speech. Although a particular bit of hate speech may be characterized as purveying or propagating a political message, *i.e.*, women should be or are subservient to men, these sorts of vitriolic epithets are seldom analyzed to discern such nuggets of meaning. Thus, for a woman to try to counter an epithet like "fucking cunt" by declaring that women are equal to men seems unresponsive,

²⁵ Katz v. Dole, 709 F.2d 251, 254 (4th Cir. 1983) (quoting C. MILLER & K. SWIFT, WORDS AND WOMEN 109 (1977)).

²⁶ As Thomas Emerson wrote in the pornography context in 1970, "[a] communication of this [erotic] nature, imposed upon a person contrary to his wishes, has all the characteristics of psychic assault . . . [and] can therefore realistically be classified as action." EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION, *supra* note 15, at 496.

²⁷ Matsuda, *Public Response to Racist Speech*, in WORDS THAT WOUND, *supra* note 1, at 24; Bowman, *Street Harassment*, *supra* note 7, at 535-40; Strauss, *Sexist Speech in the Workplace*, *supra* note 5, at 8-15.

even silly. The argument that the best antidote to such hate speech is more speech is indeed a hard one to sell. At the time the hate speech is being purveyed, rational thinking is usually not the order of the moment. The speaker is seeking to be vicious and offensive and is probably not open to a rational and reasoned debate regarding gender roles and issues. If, on the other hand, the epithet "fucking cunt" is seen as conveying no meaning, there is similarly nothing that can be said to counter effectively or respond to it. Indeed, if it is seen as pure hate, devoid of meaning, it might be more effectively countered with a pacifist or loving response rather than by additional speech about equality.

In addition to the often acute harms caused by face-to-face psychic assaults, certain "diffuse" harms also result from misogynist speech -- even if no woman hears a particular sexist or sexually hateful comment. This is because such rhetoric, even if spoken among an all-male group or to an all-male audience, tends to reinforce sex-based stereotypes and prejudices, making them more likely the basis of future attitudes, actions and decisions by those men.²⁸

IV. U.S. Legal Analysis of Hate Speech

Surely no other country's political or legal system has held the free speech principle so sacrosanct as that of the United States. Even to the point of protecting speech which undermines the very principle of free speech that the majority has democratically mandated, the United States constitution protects speech. Indeed, the American unwillingness to impose controls on racist and sexist speech puts the country at odds with the positions taken by other

²⁸ See GREENAWALT, *USES OF LANGUAGE*, *supra* note 8, at 148; Bowman, *Street Harassment*, *supra* note 8,, at 540-42.

Western democracies.²⁹ While America engages in a constitutional debate about the conflict inherent in a free speech principle so broad that it protects even speech that potentially impedes social equality, most other countries fail even to identify the conflict, assuming that free speech does not include the right to attack verbally on the basis of race, gender, religion, or ethnicity.³⁰

Those who have critically considered the First Amendment's protective stance toward hate speech have employed a number of tools in their analyses, including consideration of the philosophical justifications for free speech. Many of these tools have been devised and developed by the U.S. Supreme Court in this century, as it has sought ways in which to articulate rules that provide greater certainty as to what is and is not protected speech.

Constitutional and tort analyses of misogynist speech employ various dichotomies.³¹ For present purposes, misogynist speech may be usefully divided into two broad categories. The first category includes communicative assaults aimed at a specific woman or women, direct assaults if you will. If any redress is provided by law, the speech is most often analyzed as an intentional infliction of emotional distress or, depending on the setting, as sexual harassment; less often it is analyzed as defamatory. While some diffuse harms almost surely result from such communicative activity, it is the injury suffered by a specific woman that the court considers and for which it may provide

²⁹ Rodney Smolla, *Rethinking First Amendment Assumptions about Racist and Sexist Speech*, 47 WASH. & LEE L. REV. 171, 190 (1990) (citing laws of Great Britain, Sweden, Germany) [hereinafter Smolla, *Rethinking Sexist Speech*]. See also Lasson, *Abusing the First Amendment*, *supra* note 8, at 50-52 (discussing Danish, Swedish, British, and European Community laws).

³⁰ *Id.* See also KENT GREENAWALT, *FIGHTING WORDS: INDIVIDUALS, COMMUNITIES AND LIBERTIES OF SPEECH* (1985).

³¹ See *infra* Sect. VI.

compensation. The second category includes speech which may or may not be heard or perceived by a particular woman (or for that matter all women) but that may injure her (or them) just the same. Such speech is also derogatory of women as women, denigrating or disparaging them on the basis of their gender or some characteristic stereotypically associated with it.³² This sort of speech, perhaps because of its pervasiveness and because of the great difficulty in rationally countering such vitriol with objective facts, may present as great a threat to our goal of genuine gender equality, causing a diffuse harm that handicaps all women in some way. Injuries arising from this type of speech are sometimes also redressed by sexual harassment law.

As already noted, various U.S. laws, both statutory and case based, are relevant to a discussion of misogynist or sexually hateful speech. On a more strictly constitutional level, these include cases defining concepts such as political speech, "fighting words", and obscenity. Increased recognition of a cross-roads between such speech and sexual harassment laws recently has made it one of the most commonly pursued legal actions when offensive speech occurs in the work-place. The torts of defamation, intentional infliction of emotional distress, and even invasion of privacy have also provided redress for these types of grievances. In addition to considering elsewhere in my thesis the elements of each of these torts or constitutional issues, I will discuss in this chapter cases in which female plaintiffs, subject to sexually offensive or hateful speech, have sought redress under the various theories. Finally, I shall consider whether an *ad hoc* balancing approach featuring a greater degree of contextual consider-

³² See Bowman, *Street Harassment*, *supra* note 7, at 537, 540-42 (keeps women in "their place", reinforces the public-private divide, and helps maintain gendered hierarchy); Volokh, *Workplace Harassment*, *supra* note 7, at 1807-08.

ation, would facilitate greater responsiveness to feminist aims.

A. U.S. Constitutional Doctrines

1. *Political Speech.* One category of free speech cases that may be relevant to an analysis of sexually hateful speech is the political speech cases, beginning with *Schenk v. United States*³³ in 1919. In *Schenk* Justice Oliver Wendell Holmes wrote, regarding the defendant's circulation of leaflets opposing U.S. participation in World War I, that the relevant inquiry was "whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."³⁴ While the constitutionality of *Schenk's* conviction under the Espionage Act of 1917 was upheld, more recent cases have evinced greater deference for the free speech principle, according less weight to a danger to state security and other "compelling interests."³⁵

Subsequent cases have also drawn distinctions between expressions of abstract philosophies and more directly inciting language which, for instance, called for immediate subversive activity.³⁶ Finally, in *Brandenburg v. Ohio*,³⁷

³³ 249 U.S. 47 (1919).

³⁴ *Id.* at 52.

³⁵ Professor Lasson has speculated a bit about other harms which the Supreme Court could deem meritorious of protection, even as against first amendment concerns. These include decency (citing *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973)); reputation (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)); and psychological injury (citing *New York v. Ferber*, 458 U.S. 747 (1982)). See Lasson, *Abusing the First Amendment*, *supra* note 8, at 36.

³⁶ See, e.g., *Yates v. United States*, 354 U.S. 298 (1957); *Whitney v. California*, 274 U.S. 357 (1927); *Gitlow v. New York*, 268 U.S. 657 (1925).

the Court gave constitutional status to the temporal aspect of this distinction, holding that a state could not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing *imminent* lawless action and is likely to incite or produce such action."³⁸

The extent to which this test may be applicable to other categories of speech--or to speech that is only arguably political speech--is unclear. The *Brandenburg* legacy was that speech may be proscribed only if it incites imminent lawlessness. However, several post-*Brandenburg* cases arguably relaxed this "imminence" requirement.³⁹ That relaxation may be attributed to the Court's sensitivity to special institutional needs--in many of those cases the integrity of the state bar, for example--which it desired to protect. One wonders if the Court could not somehow muster such sympathy for very real harms--long-term, diffuse harms including the undermining of equality, as well as the short-term, direct harms resulting from "imminent lawless action" -- that sexually hateful speech can and does cause to women.

2. *Fighting Words*. In *Chaplinsky v. New Hampshire*⁴⁰, the U.S. Supreme Court stated, as if it had always been

³⁷ 395 U.S. 444 (1969). For an excellent comment on the case, see Comment, *Brandenburg v. Ohio: A Speech Test for All Seasons*, 43 U. OF CHICAGO L. REV. 151 (1975) [hereinafter Comment, *Test for all Seasons*].

³⁸ *Id.* at 376 (emphasis added). Compare *Gitlow v. New York*, 268 U.S. 657, 673 (1925) ("Every idea is an incitement . . . The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result.").

³⁹ See Comment, *Test for All Seasons*, *supra* note 37, at 165-190 (discussing *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971); *In re Stolar*, 401 U.S. 23 (1971); *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154 (1971); *Healy v. James*, 408 U.S. 169 (1972); *Parker v. Levy*, 417 U.S. 733 (1974); *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441 (1974)).

⁴⁰ 315 U.S. 568 (1942).

clearly so, that "insulting or 'fighting' words -- those which by their very utterance inflict injury or tend to incite an immediate breach of peace" do not merit constitutional protection.⁴¹ Because they form "no essential part of any exposition of ideas" and are of "such slight social value as a step to truth" their potential benefit is outweighed by "the social interest in order and morality."⁴² Taking this path in its analysis, the Court did not have to consider whether certain listeners/recipients might respond differently to "fighting words." The Court did not consider whether, generally speaking, men and women might have different thresholds for rising to anger, that is, responding to such verbal provocation and therefore for creating a breach of peace.⁴³

⁴¹ *Id.* at 571-72.

⁴² *Id.* It is important at this juncture to recognize an important distinction between "incitement to imminent lawlessness" and provocation of the "hostile audience." When the Supreme Court has spoken of the former, as in *Brandenburg*, it has referred to the danger that the audience would be incited to commit violent acts against those whom the speaker was denigrating. This is different from the hostile audience doctrine, which holds that an audience's violence (or the likelihood of it) against a speaker because of his or her communication cannot justify suppression of the communication. In other words, hecklers have no veto power, as permitting that would allow the audience to suppress unpopular ideas, even if those ideas were legitimately entitled to First Amendment protection. See, e.g., *Feiner v. New York*, 340 U.S. 298 (1957), discussed in GREENAWALT, *USES OF LANGUAGE*, *supra* note 8, at 284; see also Note, *Free Speech and the Hostile Audience*, 26 N.Y.U.L.REV. 489 (1951).

⁴³ Katherine O'Donovan has argued this gender difference in the context of criminal law, specifically regarding the defense of provocation. Katherine O'Donovan, *Defences for Battered Women Who Kill*, 18 J. OF LAW & SOCIETY 219 (1991). See also GREENAWALT, *FIGHTING WORDS*, *supra* note 30.

But see *Lamar v. Banks*, 684 F.2d 714, 719 (11th Cir. 1982) ("We have no doubt that some women [passengers] would have reacted violently, and with good reason" to cab drivers sexual proposition to female passenger, including comment, "I bet your honey doesn't have the nine and one-half inch penis I have.")

Also, because the *Chaplinsky* opinion focused upon construction of the part of the state statute that dealt with provocation to fight, it left ambiguous the Court's likely reaction to the other category of "fighting words": "those which by their very utterance inflict injury." It is this category that is more likely to include the sexually offensive and insulting language under consideration here.

Cases following *Chaplinsky* seem to indicate that "fighting words"--that is, at least some highly emotive communications--are not entirely devoid of communicative value and therefore are entitled to First Amendment protection. In *Cohen v. California*,⁴⁴ the U.S. Supreme Court recognized--even emphasized--the value of the emotive nature of some speech. At issue in *Cohen* were the words "Fuck the Draft" emblazoned on a jacket worn by the defendant in a courthouse. *Cohen* seems, then, to indicate that some level of First Amendment protection is appropriate for highly emotional outbursts--including hateful ones--even if the speech does not rise to the standard of rational fact and opinion assertions. What it does not tell us is whether such protection stands when the hate is directed at an individual or a particular group, united by some immutable characteristic and perhaps also historically disadvantaged, rather than at a government's decision to engage in an unpopular war.

In 1992 with the case of *R.A.V. v. St. Paul*,⁴⁵ the U.S. Supreme Court held unconstitutional a city ordinance

The court in *Lamar*, construing the Georgia fighting words statute, observed that "it makes no sense for a defendant's criminality to depend on the actual reaction of the hearer of the [] words. Under the [defendant's proposed rule], if the young woman had struck the [defendant], or struck at him, he would be validly convicted, but because she had the prudence to restrain herself, his words would be constitutionally protected." *Id.* at 718.

⁴⁴ 403 U.S. 15 (1971).

⁴⁵ 112 S.Ct. 2538 (1992).

that made criminal the placing of any object, e.g., burning cross, swastika, on private property when the actor knew or had reasonable grounds to know that the object would arouse "anger, alarm, or resentment in others on the basis of race, color, creed or gender."⁴⁶ When white youths placed a burning cross (symbolizing the Ku Klux Klan) in the backyard of an African-American family, they were prosecuted under the ordinance. The Minnesota Supreme Court upheld the conviction, stating that to the extent the placement of the cross was speech, it constituted *Chaplinsky* "fighting words" and therefore was not protected by the constitution.⁴⁷ A plurality of the U.S. Supreme Court, however, overturned the conviction and declared the ordinance unconstitutional as a content-based regulation. Essentially, by singling out "race, color, creed and gender" as the basis for prohibited conduct, a plurality of the Court said that the ordinance disadvantaged those whose hate rested on those articulated bases as opposed to some other prejudice, e.g., sexual orientation. Justice Scalia, writing for the plurality, suggested that the ordinance would have been acceptable if it had not specified any particular basis or inspiration for the hate.⁴⁸ *R.A.V.*, then, seems to leave *Chaplinsky* largely intact. It cautions those seeking to proscribe hate speech, however, to focus on the "fighting words", that is, the incitement to violence aspects, rather than on the particular prejudice that might inspire the speech or on the other types of harms that may result from it.

⁴⁶ *Id.* at 2541 (quoting St. Paul, Minn. Legis. Code, § 292.02 (1990)).

⁴⁷ *In re Welfare of R.A.V.*, 464 N.W.2d 507 (Minn. 1991).

⁴⁸ *R.A.V.*, 112 S.Ct. at 2547-48.

B. Other Relevant U.S. Law

1. *The Group Libel Analysis.* The approach to group libel under U.S. law has become so deeply imbued with constitutional limitations that few statutes criminalizing such speech are still on the books and, thus, law suits based on the action are rarely brought. Oddly, the landmark Supreme Court pronouncement on the subject in 1952, *Beauharnais v. Illinois*⁴⁹, upheld an Illinois statute under which a man had been convicted for attacking citizens on the basis of any "race, color, creed or national origin."⁵⁰ Justice Frankfurter, for the Court, noted that because private libel laws were not subject to First Amendment considerations, neither should group libel laws be. The Justices seemed concerned because an individual's dignity and reputation were associated with the groups of which that individual was a member; hence there was some justification for regulating speech hateful to the group or defamatory because denigrating based upon a particular bad characteristic attributed to members of the group. While noting that this law would contribute to preservation of the peace, the Court did not state a comprehensive public order analysis. Indeed, in that sense it is easily distinguishable from the subsequent case, *Brandenburg*. While the defendant argued for application of the clear and present danger test, the Court focused on the statute as strictly a criminal libel provision, addressing issues of truth, defamatory meaning, and publication.⁵¹ This characterization as a libel statute helped disarm those who wanted to re-cast it as a breach-of-peace issue, with regard to which

⁴⁹ 343 U.S. 250 (1952).

⁵⁰ The Illinois Supreme Court had construed the statute as a type of criminal libel law. *Id.* at 250. The law penalized publications that "portray[ed] depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed, or religion to contempt, derision, or obloquy or which is productive of breach of the peace riots". *Id.* at 251.

⁵¹ *Id.* at 254.

imminence of lawlessness would be relevant. The majority, citing *Chaplinsky* for the proposition that certain types of speech, including libel, raise no constitutional problem,⁵² effectively skirted the incitement-to-violence issue. In an interesting but seldom cited bit of dictum, the Court wrote:

violence between racial and religious groups must be traced to causes more deeply embedded in our society than the rantings of modern Know-nothings.⁵³ Only those lacking humility will have a confident solution for problems as intractable as the frictions attributable to differences of race, color or religion.⁵³

Thus, the Court recognized state power to enact legislation in attempting to deal with such "obstinate social issues."⁵⁴

The Court speculated briefly about social scientists' claims about the "dependence of the individual on the position of his racial or religious group in the community." Accordingly, the majority considered it inappropriate to rule that group libel laws, sanctioned by centuries of Anglo-American jurisprudence, were unconstitutional.⁵⁵ "[S]peech concededly punishable when immediately directed at individuals cannot be outlawed if directed at groups with whose position and esteem in society the affiliated individual may be inextricably involved."⁵⁶

While *Beauharnais* has never been expressly overruled, both scholars and jurists doubt its soundness as precedent. Twelve years after *Beauharnais* the Supreme Court in *New*

⁵² *Id.* at 256.

⁵³ *Id.* at 262 (citation omitted).

⁵⁴ *Id.*

⁵⁵ *Id.* at 263.

⁵⁶ *Id.*

*York Times v. Sullivan*⁵⁷ determined that common law defamation is subject to certain restrictions based upon the First Amendment. Moreover, subsequent cases addressing the group libel issue have treated *Beauharnais* as dubious precedent⁵⁸; others have distinguished it.⁵⁹

One important, more recent decision, *Doe v. University of Michigan*,⁶⁰ stood to test the rule of *Beauharnais*. The *Doe* court ruled that a university's attempt to curb harassing activity, including speech, was unconstitutional because of its overbreadth. The policy, adopted by the University of Michigan following a series of racially and ethnically offensive campus incidents, made a student subject to discipline if he or she engaged in

Any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-veteran status.⁶¹

The code section went on to articulate a number of specific types of harms which, coupled with the basic element already quoted, constituted the offense.⁶² It was, in

⁵⁷ 376 U.S. 254 (1964).

⁵⁸ See, e.g., *Doe v. University of Michigan*, 721 F.Supp. 852, 863 (E.D.Mich. 1989).

⁵⁹ See, e.g., *Collin v. Smith*, 578 F.2d 1197, 1204 (1978). For a cogent argument that *Beauharnais* is still good law, see Lasson, *Abusing the First Amendment*, *supra* note 8, at 32-37.

⁶⁰ 721 F.Supp. 852 (E.D. Mich. 1989).

⁶¹ *Id.* at 856.

⁶² *Id.* These included:

- a. Involves an express or implied threat to an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or
- b. Has the purpose or reasonably foreseeable effect of interfering with an individual's aca-

part, a group libel law for the campus, but the scope of prohibited activity went beyond mere communication.

A second part of the University of Michigan policy dealt specifically with sexual harassment issues. It provided for the punishment of

Sexual advances, requests for sexual favors, and verbal or physical conduct that stigmatizes or victimizes an individual on the basis of sex or sexual orientation. . . .⁶³

when coupled with either (a) "an express or implied threat to an individual's academic efforts, employment" or extra-curricular university participation; (b) "the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, employment" or extra-curricular university participation; or (c) creation of a "hostile, or demeaning environment for educational pursuits, employment" or extra-curricular university participation.⁶⁴

The court began its analysis of the First Amendment issue by addressing the "Scope of Permissible Regulation." In a value-laden statement, the court wrote that "most extreme and blatant forms of discriminatory conduct are not protected by the First Amendment."⁶⁵ It went on to itemize a number of these unprotected forms of conduct, citing Michigan and federal statutes that prohibit discrimination

demic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or
c. Creates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extra-curricular activities.

Id. In the midst of the lawsuit, the University publicly announced withdrawal of section 1(c), noting that it needed "further explanation and clarification". *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 861.

in employment, education, and government benefits, as well as various criminal statutes targeting crimes like physical assault and "property damage and destruction for purposes of ethnic intimidation."⁶⁶ Moving on to the gender-related provisions, the court cited the existence of laws against rape, abduction, obscenity and sexual harassment.⁶⁷ Considering the existence of such criminal and civil causes of action, the court found the University's policy redundant insofar as it replicated them, but not objectionable on First Amendment grounds with regard to its coverage of such crimes.

The court next addressed more directly the free speech principle. Citing *Chaplinsky*⁶⁸, *Brandenburg*⁶⁹, *Miller*⁷⁰ and other key precedents, the court observed that "fighting words," speech inciting imminent lawless action, and obscene speech are all unprotected by the First Amendment.⁷¹ Finally, "'vulgar', 'offensive', and 'shocking'" speech is not entitled to absolute constitutional protection in all circumstances.⁷² The court believed, however, that the University of Michigan had gone beyond constitutionally permissible regulation of these types of speech. Indeed, the *Doe* court considered that the University of Michigan was employing a regulation that was constitution-

⁶⁶ *Id.* at 862 (citing, among others, MICH. STAT. ANN. § 28.344(s) [M.C.L.A. § 750.1476]).

⁶⁷ *Id.* at 862 (citing, amongst other precedents, *Meritor Savs. Bank v. Vinson*, 477 U.S. 57 (1986)).

⁶⁸ 315 U.S. 568 (1942).

⁶⁹ 395 U.S. 444 (1969).

⁷⁰ *Miller v. California*, 413 U.S. 15 (1973) (germinal U.S. obscenity law case).

⁷¹ *Id.* at 862-63.

⁷² *Id.* at 863 (citing *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)).

ally taboo because it was content-based.⁷³ Finally, disregarding its earlier comment that such protection was not absolute, the court concluded that the University could not proscribe speech "simply because it was found to be offensive, even gravely so, by large numbers of people."⁷⁴ Substantiating its finding of overbreadth, the court compared the language of the University policy with the key elements of the "fighting words" cases that might have supported it and found the university code defective.

⁷³ *Id.* at 863 (citing *Texas v. Johnson*, 109 S.Ct. 2533 (1989); *Chicago Police Dept. v. Mosley*, 408 U.S. 92 (1972); *Cohen v. California*, 403 U.S. 15 (1971), amongst others).

⁷⁴ *Id.* at 863.

Looking at the brief history of application of the code, the *Doe* court found more cause for concern. In several instances the code had been invoked to bring to hearing or to informal discussions students who had stated arguably offensive propositions about homosexuals and minorities in academic settings. *Id.* at 865-66. The three instances of policy invocation/application described in the opinion did indeed seem egregious from the point of the students. This is because they were the very types of allegations or generalizations that could be best addressed by the marketplace of ideas approach, that is, by more speech. Only one of the three was made in a manner, tone or context that could have been considered vitriolic.

Considering the plain language of the policy, the court concluded that it was not only over-broad, but also vague. In scrutinizing the precise language of the policy, the court noted that several of the terms, such as "victimize" and "stigmatize", elude precise definition. Additionally, such tests were not, the court concluded, synonymous with such offence as would cause loss of First Amendment protection. *Id.* at 867. In considering other "tests" or standards imposed by the policy, the court focused upon the effect element of the offense: "threat" to an individual's academic efforts. The court stated that if the threat was of some future retaliation by the speaker, it would indeed be unprotected speech. However, if the "threat" were merely "to a victim's academic success because the stigmatizing and victimizing speech is so inherently distracting" it is "not clear" whether the communication would forfeit First Amendment protection. So, by relying on the overbreadth and vagueness rationales to strike down the University of Michigan policy, the court avoided stating a precise rule regarding what is or is not currently a constitutionally permissible regulation of offensive, harassing, extremist speech.

Interestingly, it did not regard *Beauharnais v. Illinois* as a litmus test for an extreme offensiveness prohibition, evincing the court's discomfort with that shaky precedent.

A number of the *Doe* court criticisms were entirely valid, including concern that reasoned opinions expressed in classrooms and other academic settings should be protected. These sorts of opinions, however, are quite different from the vitriolic and assaultive communications that apparently led university officials to adopt the policy. One wonders what reaction a more tightly drafted code would receive from a court slightly more sensitive to the diffuse harms caused by speech that is so immediately dis-empowering that it arguably cannot be countered with more speech.

In the group libel analysis, the U.S. Supreme Court again ignores equality issues in complete deference to the First Amendment. As Professor MacKinnon has written:

[G]roup libel, most of it concededly expression, promotes the disadvantage of unequal groups; []group-based enmity, ill will, intolerance, and prejudice are the attitudinal engines of the exclusion, denigration, and subordination that make up and propel social inequality; that without bigotry, social systems of enforced separation, ghettoization, and apartheid would be unnecessary, impossible, and unthinkable; that stereotyping and stigmatization of historically disadvantaged groups through group hate propaganda shape their social image and reputation, which controls their access to opportunities more powerfully than their individual abilities ever do; and that it is impossible for an individual ever to receive equality of opportunity when surrounded by an atmosphere of group hate.⁷⁵

It is interesting to note that the dictum in the first Supreme Court pronouncement on group libel, *Beauharnais*, appeared to recognize this dynamic, a dynamic it seems since to have ignored.

⁷⁵ CATHERINE MACKINNON, ONLY WORDS 99 (1993).

2. *Intentional Infliction of Emotional Distress.* A few plaintiffs seeking redress for harm caused by vitriolic and caustic language have successfully employed the relatively new tort of intentional infliction of emotional distress, also known as the tort of outrage in some jurisdictions. Focusing upon the psychological harm caused by the offensive language, these courts have allowed plaintiffs to recover if the objectionable language rises to the standard of extreme and outrageous offense⁷⁶ to a "generally accepted standard of decency and morality."⁷⁷ The tort also requires that the plaintiff prove "severe distress."⁷⁸ A number of the successful suits have arisen in the context of employment situations where federal sex discrimination (so-called Title VII) claims were brought in addition to the intentional infliction of emotional distress cause of action. In *Swentek v. USAir, Inc.*,⁷⁹ Betsy Swentek brought a Title VII suit, with pendent state claims for intentional infliction of emotional distress, assault and battery, and invasion of privacy against USAir, her employer. She also named as a defendant her fellow employee, Jon Ludlam, based on a veritable catalogue of alleged offenses he had committed against her. From grabbing her genitals to calling her "cunt" and "outstanding snatch" to threatening to delay her

⁷⁶ See generally RESTATEMENT (SECOND) OF THE LAW OF TORTS, § 461 (1965) [hereinafter RESTATEMENT (SECOND)]; see also *Rogers v. Loews L'Enfant Plaza Hotel*, 526 F.Supp. 523 (1981) (conduct must be "wanton, outrageous in the extreme, or especially calculated to cause serious mental distress"); *Samms v. Eccles*, 11 Utah 2d 289, 358 P.2d 344 (1961); *Branda v. Sanford*, 637 P.2d 1223 (Nev. 1981); *Bristow v. Drake Street, Inc.*, 41 F.3d 345 (7th Cir. 1994).

⁷⁷ *Samms*, 358 P.2d at 347 (citing Calvert Magruder, *Mental and Emotional Distress in the Law of Torts*, 49 HARV. L. REV. 1033, 1055 (1936)); see also Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42 (1982).

⁷⁸ See, e.g., *Bristow*, 41 F.3d at 347 (citing RESTATEMENT (SECOND), at § 46, comment j).

⁷⁹ 830 F.2d 552 (4th Cir. 1987).

pay, pilot Ludlam allegedly engaged in various harassing incidents against flight attendant Swentek over a nine-month period.⁸⁰

At trial, the jury ruled in favour of Swentek on her intentional infliction of emotional distress claim, awarding her \$10,000 in compensatory damages and \$10,000 in punitive damages, but ruled against her on other tort claims.⁸¹ On the Title VII claim, the judge stated a number of specific findings of fact against Swentek, ruling that several of the alleged incidents did not occur. Based on these findings of fact, including his belief that Swentek found Ludlam's behaviour "not unwelcome," the judge determined that Swentek had not been placed in a hostile working environment such that Title VII had been violated.⁸² Responding to motions by both parties, the judge granted a new trial. At that second trial, a different judge ruled that the conduct alleged was not severe enough to state an emotional distress claim.⁸³ Finally, on appeal, the Fourth Circuit held that the trial court had properly granted a new trial on the emotional distress claim because of the judge's own determinations regarding credibility of conflicting witnesses.⁸⁴ That so many factfinders, lay (jury) and professional (judges) viewed and

⁸⁰ *Id.* at 554-56. Swentek claimed that Ludlam sang limericks to her and the other crew members during a limousine ride, presumably between airport and hotel. She claimed he told her during the flight that he could tell when the cabin temperature was too low by looking at her nipples and that "girls with big breasts usually have ugly nipples." *Id.* at 555 n.1. She alleged that he "dropped to his knees and sniffed her" when first introduced to her on a plane during a crew change. *Id.* at 555. He also allegedly disparaged her age and weight and exposed himself to her by dropping his trousers. *Id.*

⁸¹ *Id.* at 556.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 559.

assessed the same witnesses and their testimony so differently is noteworthy in and of itself and illustrates the vagaries of judgment that often characterise such cases.

In another case, *Hall v. Gus Construction Co.*,⁸⁵ women who worked on a road construction project with male defendants were allowed recovery for emotional distress under a state civil rights statute when the men taunted them repeatedly with epithets such as "fucking flag girls", "blond bitch" and "cavern cunt".⁸⁶ The men also flashed at the women pornographic pictures depicting oral intercourse, accompanied by verbal requests that the women perform such sex acts with them. The federal appellate court upheld an award of damages for emotional distress, noting that the pattern of verbal abuse of the plaintiffs was "well beyond the bounds of what any person should have to tolerate",⁸⁷ even though the women had likely expected to be exposed to profanity on the job.⁸⁸

In *Branda v. Sanford*,⁸⁹ the plaintiff, a 15-year-old bus girl at a Las Vegas hotel, was allegedly accosted by Redd Foxx who said or yelled at her that she was a "fucking bitch", "fucking cunt" and "no lady." A number of hotel patrons apparently overheard the altercation, which was quite loud. The plaintiff sued, alleging both defamation

⁸⁵ 842 F.2d 1010 (8th Cir. 1988).

⁸⁶ *Id.* at 1012. The degree of outrageousness required under the Iowa Civil Rights Act was not determined.

⁸⁷ *Id.* at 1018.

⁸⁸ Both the *Swentek* and *Hall* courts alluded to the expectations or attitudes/behaviour of the female plaintiffs in relation to the appropriateness of the male defendants' objectionable behaviour. The implication is that the expectations of the women were relevant and were somehow different because they were women--or because of the "type" of women they were. See also *Burns v. McGregor Electronics Industries, Inc.*, 807 F.2d 506 (8th Cir. 1993). See *infra* note 112 (discussing briefly the so-called Madonna-Whore dichotomy).

⁸⁹ 97 Nev. 643, 637 P.2d 1223 (1981).

and intentional infliction of emotional distress, and the trial court dismissed both actions. On appeal, the Nevada Supreme Court held that the plaintiff had pleaded and sufficiently proved intentional infliction of emotion distress at trial so that the matter should have been submitted to the jury to determine whether "considering prevailing circumstances, contemporary attitudes and [the plaintiff's] own susceptibility, [] the conduct in question constituted extreme outrage."⁹⁰

Another interesting case outside the employment setting is *Smith v. Atkins*.⁹¹ There the appellate court reversed a jury's finding that the defendant law professor's calling his female student (plaintiff) a "slut" in class did constitute intentional infliction of emotional distress.

As noted in Chapters 4 and 5, development of the tort of intentional infliction of emotional distress has been considered by some a "feminization" of tort law because its recognition of psychic injury--even independent of accompanying physical harm--generally inured to the benefit of women, especially in the early days of the tort's development.⁹² The harm was one associated with women, and the early resistance to its legal recognition may be attributable to that association. The tort's evolution in recent decades has proven it useful in redressing various communicative injuries for a wide variety of plaintiffs in a wide variety of situations. Its increased use by women plaintiffs, otherwise without legal recourse for gender-related

⁹⁰ *Id.* at 649, 637 P.2d at 1227. As to a defamation cause of action, the appellate court held that the jury should have been allowed to determine whether the offensive statements were susceptible of a defamatory meaning.

⁹¹ 622 So.2d 795 (La.App. 4 Cir. 1993).

⁹² See generally Martha Chamallas and Linda Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814 (1990).

slurs and epithets, however, seems a further indication of its gendered character.

The constitutional limitation on intentional infliction of emotional distress has been discussed exhaustively in Chapter 4 on defamation. It is appropriate here, however, to highlight the holding of *Hustler Magazine, Inc. v. Falwell*,⁹³ wherein the Supreme Court determined that the *New York Times* actual malice fault standard applied to emotional distress cases brought by public figures or public officials.⁹⁴ The defamation context meaning of actual malice⁹⁵ not being wholly appropriate to the emotional distress context where a parody was at issue, the Court tailored the standard by adding that the plaintiff must also prove that defendant made a "reasonably believable" false statement of fact.⁹⁶

The relevance of *Falwell* to any emotional distress case turns on the determination of whether the plaintiff is a public figure or public official. To this extent, the discussion in Chapter 4 is also relevant, as it considers the still relative scarcity, but increasing numbers, of women in such public roles, as well as the great extent to which their sexuality is commonly a point of denigration when they are.

3. *The Sexual Harassment Analysis.* The strengthening of sexual harassment and sexual discrimination laws in recent years has to some extent empowered women to take legal action when they are victimized by sexually hateful speech in the work-place. Catharine MacKinnon has long sought to focus attention on the fact that much sexual

⁹³ 485 U.S. 46 (1988).

⁹⁴ *Id.* at 56.

⁹⁵ The *New York Times* meaning applicable to the defamation context is publication "with knowledge that the statement is false or with reckless disregard as to whether or not it was true." *Id.* at 56.

⁹⁶ *Id.* at 57.

harassment is verbal, and she would apparently have few qualms about prohibiting it, believing as she does that the very real harm to victims outweighs any abstract interest in free speech.⁹⁷ MacKinnon observed in her most recent book, *Only Words*, that sexual harassment law has proved the most successful strategy for dealing with much sexually hateful speech.⁹⁸

Other commentators, however, would maintain the First Amendment's preeminence, even in the work-place. That is, most libertarians would restrict sexist speech either not at all or only if one or both of the following factors is present: (1) the speech is directed at a specific person; (2) the speech creates an "abusive, hostile or offensive [working] environment" such that "terms and conditions of employment" are based on sex.⁹⁹ In 1986, the U.S. Supreme Court in *Meritor Savings Bank v. Vinson*, without engaging in any First Amendment analysis, determined that the presence of these factors brings such speech within the sex discrimination prohibition of Title VII.¹⁰⁰

While *Meritor* has rightly been considered a major victory for women, it arguably did not go far enough. *Meritor* requires a pattern of harassment sufficient to create a hostile working environment; isolated instances of

⁹⁷ CATHERINE MACKINNON, *FEMINISM UNMODIFIED*, ch. 9 (1987); see also Volokh, *Workplace Harassment*, *supra* note 7, at 1809-18.

⁹⁸ CATHERINE MACKINNON, *ONLY WORDS*, ch. 2 (1993).

⁹⁹ *Meritor Savs. Bank v. Vinson*, 477 U.S. 57 (1986); see generally Note, *An Equitable Liability Standard for Offensive Work Environment Claims Under Title VII: Meritor Savings Bank v. Vinson*, 29 B.C.L.REV. 509 (1988); Note, *Employer Liability Under Title VII for Sexual Harassment after Meritor Savings Bank v. Vinson*, 87 COLUM. L. REV. 1258 (1987); see generally Eugene Volokh, *Freedom of Speech and Appellate Review in Workplace Harassment Cases*, 90 NORTHWESTERN U. L. REV. 1009 (1996) [hereinafter Volokh, *Appellate Review*]; Volokh, *Workplace Harassment*, *supra* note 7.

¹⁰⁰ *Meritor*, 477 U.S. at 63-67; see Browne, *Title VII as Censorship*, *infra* note 176.

harassment, particularly if they are verbal only, are almost always insufficient to meet the test.¹⁰¹ *Meritor* may be contrasted with courts' greater sensitivity and receptivity to the redress of race-related harms. As Professor Jean Love has queried, "[a]re not isolated sexual epithets every bit as degrading as isolated racial or ethnic epithets?"¹⁰² Observing that the latter are more frequently accorded legal redress, she opined that "[s]urely these sexual epithets cause the same type of adverse impact on the victim's sense of self-esteem,[□] and they reinforce the same types of historical patterns of oppression as racial or ethnic epithets."¹⁰³

In the *Swentek* case, discussed above, one of the defenses asserted against Ms. Swentek's suit was that she had used "foul language" with sexual innuendo in the past, the implication being that defendant Ludlam's comments could not have been unwelcome to a woman "like this", apparently meaning one of her character as the court judged it, even though she asserted she had told Ludlam to leave her alone.¹⁰⁴ The federal district court found the argument convincing, as the judge observed that Swentek "was the kind of person who could not be offended by such comments and therefore welcomed them generally."¹⁰⁵ The appellate court disagreed, stating that the plaintiff's use of foul language or sexual innuendo in a consensual setting

¹⁰¹ *Meritor*, 477 U.S. at 67.

¹⁰² Jean Love, *Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress*, 47 WASH. & LEE L. REV. 123, 140 (1990).

¹⁰³ *Id.* (citation omitted). Professor Love was specifically discussing section 6-103(b) of the Model Communicative Torts Act, the common law tort of intentional infliction of emotional distress, and Title VII sexual harassment suits.

¹⁰⁴ 830 F.2d 552, 557 (4th Cir. 1987).

¹⁰⁵ *Id.*

does not cause her to forfeit her legal protections against sexual harassment.¹⁰⁶

The more recent case of *Carr v. Allison Gas Turbine Division of General Motors*¹⁰⁷ is similarly heartening for women. There the plaintiff, the first female drill operator to work in the tinsmith shop, was the target of daily comments such as "I won't work with any cunt." She was also referred to, in her presence, as "whore," "cunt," and "split tail." The word "cunt" was painted on her toolbox, and the seat was cut out of her overalls.

They festooned her tool box and work area with signs, pictures, and graffiti of an offensive sexual character, hid and stole her tools, hid her toolbox, hung nude pin-ups around the shop, and would strip to their underwear in front of her when changing in and out of their work clothes. One of them placed an obscene Valentine Day's card, addressed to "Cunt" on her toolbox. The card shows a man carrying a naked woman upside down, and the text explains that the man has finally discovered why a woman has two holes--so that she can be carried like a six-pack. A worker named Beckham twice exhibited his penis. . . . And it was Beckham who told Carr on another occasion that if he fell from a dangerous height in the shop she would have to give him "mouth to dick" resuscitation.¹⁰⁸

The defendant argued that her co-workers' behavior had not been unwelcome to Carr, whom it described as "vulgar." Carr had used words such as "'fuck head' and 'dick head,' once placed her hand on the thigh of a young male worker,

¹⁰⁶ *Id.* at 557 (citing *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983)); see also *Burns v. McGregor Electronic Industries, Inc.*, 807 F.2d 506 (8th Cir. 1993) (stating that plaintiff's decision to pose for a nude magazine outside work hours was not material to issue of whether she found her employer's work-related conduct offensive; court stated that "Burns did not tell sexual stories or engage in sexual gestures at work. She did not initiate sexual talk or solicit sexual encounters with co-employees.").

¹⁰⁷ 32 F.3d 1007 (7th Cir. 1994).

¹⁰⁸ *Id.* at 1009.

and, when shown a pornographic picture and asked to point out the clitoris, obliged."¹⁰⁹ Judge Posner for the majority scoffed at the suggestion that this behaviour altered the dynamic, noting that he had "trouble *imagining* a situation in which male factory workers sexually harass a lone woman in *self-defense* as it were . . . It is incredible on the admitted facts."¹¹⁰ Noting that Carr had repeatedly complained to supervisors about the harassment and stating that "[o]f course it was unwelcome," Posner derided the trial court judge's finding that, had she been "lady-like," the co-workers would have left Carr alone.¹¹¹

These appellate courts' rulings are somewhat heartening to women because the courts refused to accept the fallacy of the Madonna-whore dichotomy, classifying women as either vestal virgins on pedestals or immoral women unworthy of legal protection--and granting them legal rights and protection accordingly.¹¹² Nevertheless, there

¹⁰⁹ *Id.* at 1010.

¹¹⁰ *Id.* at 1011 (emphasis original).

¹¹¹ *Id.*

¹¹² See PORNOGRAPHY AND CENSORSHIP (Copp & Wendell, eds.) at 71 (1983). The so-called "Madonna-Whore" dichotomy is a way of explaining (or at least expressing) how men view women and categorize them.

The 'respect' that men have traditionally believed they have for women -- hence a respect they can lose -- is not a general respect for persons as autonomous beings; nor is it respect that is earned because of one's personal merits or achievements. It is respect that is an outgrowth of the 'double standard.' Women are to be respected because they are more pure, delicate, and fragile than men, have more refined sensibilities, and so on. Because some women clearly do not have these qualities, and thus do not deserve respect, women must be divided into two groups -- the good ones on the pedestal and the bad ones who have fallen from it. One's mother, grandmother, Sunday School teacher, and usually one's wife are 'good' women. The appropriate behavior by which to express respect for good women would be, for example, not swearing or telling dirty jokes in front of them, giving them seats on

are many cases finding to the contrary on similar facts.¹¹³ In *Meritor* the Supreme Court ruled that evidence of the plaintiff's "provocative speech and dress was relevant in determining whether she welcomed sexual advances from her supervisors."¹¹⁴ The appellate court in *Swentek* distinguished that case, noting that Mechelle Vinson had worked with her supervisor daily and thus her dress and daily conversations were relevant in determining her attitude toward his sexual advances.¹¹⁵ As the *Swentek* court observed, the alleged incidents of Ms. Swentek's use of foul

buses, and other 'chivalrous' acts. This kind of 'respect' for good women is the same sort that adolescent boys in the back seats of cars used to 'promise' not to lose. . . . It has now become commonplace to acknowledge that, although a place on the pedestal might have advantages over a place in the 'gutter' beneath it, a place on the pedestal is not at all equal to the place occupied by other people (i.e. men). 'Respect' for those on the pedestal was not respect for whole, full-fledged people but for a special class of inferior beings. . . . [This male respect] is half-hearted respect for lesser beings, some of whom they feel the need to glorify and purify.

See also Cathy Young, *The New Madonna/Whore Syndrome: Feminism, Sexuality and Sexual Harassment*, 38 N.Y.L. SCH. L. REV. 257 (1993); SHULAMITH FIRESTONE, *THE DIALECTIC OF SEX: THE CASE FOR THE FEMINIST REVOLUTION* 128-32 (1970); SUSANNE KAPPELER, *THE PORNOGRAPHY OF REPRESENTATION* 67 (1986); DAVID L. KIRP, MARK G. YUDOF, AND MARLENE STRONG FRANK, *GENDER JUSTICE*, ch. 2 (1986).

This dichotomy is implicit in a recently suggested "test" for whether any given comment would be considered sexual harassment: Would you say it to your mother, sister or daughter? If not, do not say it to any other woman. The point is, if you would not say something to one of these "nice" or "good" girls/women you should not say it to any woman, not even one you might consider less virtuous than your mother, sister or daughter. See Volokh, *Appellate Review*, *supra* note 99, at 1015 (citations omitted).

¹¹³ See, e.g., *Reed v. Shepard*, 939 F.2d 484 (7th Cir. 1991); *Loftin-Boggs v. City of Meridian*, 633 F.Supp. 1323 (S.D.Miss. 1986), *aff'd* 824 F.2d 971 (5th Cir. 1987), *cert. denied*, 484 U.S. 1063 (1988).

¹¹⁴ *Meritor Savs. Bank v. Vinson*, 477 U.S. 57, 69 (1986).

¹¹⁵ 830 F.2d 552, 557 (4th Cir. 1987).

language and sexual innuendo had not occurred in the presence of Ludlam, and no evidence of his knowledge of them was presented. Based on this evidence, and considering that Swentek had told Ludlam his behaviour was unwelcome, the court determined that the trial judge's determination that Ludlam's behaviour was "not unwelcome" was an improper one.¹¹⁶

Another recent U.S. case to deal with while not expressly acknowledging the conflict between Title VII's sexual harassment precedent and the First Amendment, *Robinson v. Jacksonville Shipyards, Inc.*,¹¹⁷ was brought by a female employee of a Florida shipyard, alleging that her male colleagues had sexually harassed her, in violation of Title VII. She complained about their hanging photos of nude women in the work-place, as well as by their lewd comments.¹¹⁸ Whether the comments were actually directed at the plaintiff was disputed, but they included remarks such as "I'd like to get in bed with that" and "Hey, pussycat, come here,"¹¹⁹ and thus seem to have been directed at someone. The U.S. district judge ruled in favour of

¹¹⁶ *Id.* at 556-57. This seems consistent with *Burns*, 807 F.2d 506 (8th Cir. 1993).

¹¹⁷ 760 F.Supp. 1486 (M.D. Fla. 1991), discussed in, Amy Horton (Comment) *Of Supervision, Centerfolds, and Censorship: Sexual Harassment, the First Amendment, and the Contours of Title VII*, 46 U. MIAMI L. REV. 403 (1991).

¹¹⁸ See *Harassment, free speech collide in Florida, USA Today*, Int'l ed., Nov. 21, 1991, at 8A; *Gender issue begins to bend back*, *The Times* (London), Nov. 21, 1991. See also EEOC Compliance Manual (CCH) §614, ¶ 3114(C)(1), at 3274 (1990) (a "workplace in which sexual slurs, displays of 'girlie' pictures, and other offensive conduct abound can constitute a hostile work environment, even if many people deem it to be harmless and insignificant.")

¹¹⁹ *Id.*

the woman, ordering that the posters be removed and the smutty jokes ceased.¹²⁰

Some have characterized speech such as that in *Jacksonville Shipyards* as within a "gray area"--offensive but not threatening. A cogent argument can be made, however, that it is indeed threatening to the women exposed to it, especially those exposed to it regularly, day in and day out. Not only are the dignity and self-esteem of these women threatened, so may be their health and their jobs. The prevalence of rape and sexual assaults is not taken lightly by women, and it is offensive for a male-dominated judiciary to assume that "I'd like to get in bed with that" is not threatening.¹²¹ Additionally, female employees may be considered a captive audience, unable to escape the harassment -- even if it is non-targeted -- without giving up their jobs.

The most recent U.S. Supreme Court case to take up the sexual harassment issue is *Harris v. Forklift Systems, Inc.*¹²² The female plaintiff in *Harris* was harassed by the company president who, in the presence of other employees, told her that she was a "dumb ass woman," and suggested that they "go to the Holiday Inn to negotiate [her] raise." Among other things, he also asked Harris to get coins from his front pants pocket, and he made sexual innuendoes about Harris's and other women's clothing. As in preceding Title

¹²⁰ Cf. *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620-22 (6th Cir.1986) (sexually oriented poster displays had a de minimis effect on work environment); *infra* text accompanying notes 154-55, 159-60 (discussing *Stewart v. Cleveland Guest (Engineering) Ltd.*)

¹²¹ See generally Jane E. Larson, *Third Wave--Can Feminists Use the Law to Effect Social Change in the 1990s?* 87 NORTHWESTERN U. L. REV. 1252, 1257 (1993) (discussing Linda Hirshman's writing); see also A WEEK IN THE LIFE OF AMERICA, *supra* note 7, at 7; Fentonmiller, *Verbal Harassment as Equality Depriving Conduct*, *supra* note 6, at 577 (discussing *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3d Cir. 1990)).

¹²² 114 S.Ct. 367 (1993).

VII cases, the Court was silent about First Amendment implications for the case, even though the basis of the complaint was speech and expressive conduct. Instead, the Court's opinion was focused entirely on the harm of sexual harassment. The court wrote that the harm of hostile environment sexual harassment was the presence of a "discriminatorily abusive work environment" and that the harm of sexual harassment is the harassing behavior or words themselves, not whatever tangible effects, economic or psychological, on the victim.¹²³ Thus the Court appeared to recognize the equality-depriving effect of a hostile-work environment, even apart from the usually attendant tangible harms.

4. *Pornography as Hate Speech.* As the debate about what protection should be afforded hate speech has intensified, parallels between this type of offensive speech and another type--pornography--have begun to be identified.¹²⁴ After all, many feminists would argue that pornography is hate speech, "construct[ing] [and therefore mandating] the social reality of gender,"¹²⁵ defining women as subservient to men and, sometimes, even as sub-human. What is the ideological difference between the message of pornographic material pictorially portraying a woman in forced sexual submission or merely as a body part and the message of the slur, "stinking cunt" yelled out at an individual woman or to a mixed gender group? Both are arguably pure hate, pure misogyny, expressing disgust and violence. Both arguably silence women, preventing their exercise of their free

¹²³ *Id.* at 370-71.

¹²⁴ See, e.g., *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985) (citing *Beauharnais* in holding unconstitutional MacKinnon-Dworkin anti-pornography ordinance that was premised to an extent on a group libel rationale).

¹²⁵ CATHARINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES IN LIFE AND LAW*, 166 (1987).

speech right and therefore rendering the "right" of little use to them.¹²⁶

Pornographic materials, as illustrated in several of the sexual harassment cases discussed above, are frequently used as instruments of such harassment or to inflict intentionally emotional distress.¹²⁷ Additionally, because obscene (and/or pornographic) materials are not always pictorial, some materials could be assessed under either or both obscenity law or another type of hate speech analysis.

Consider, for example, the early 1990 U.S. controversy over the music of the rap group 2 Live Crew. The lyrics of the songs for which the group was prosecuted under a Florida obscenity statute included, "Suck my dick, bitch, it makes you puke"; "I'll break ya down and dick ya long; Bust your pussy then break your backbone."¹²⁸ They could as easily have been the subject of prosecution under a group libel statute sensitive to gender as a category. A woman at whom the lyrics were directed could sue the communicator for intentional infliction of emotional distress. They might even be vulnerable to suppression under a *Brandenburg* "imminent incitement to violence" analysis, since they clearly advocate violence against women--specifically in the lyrics quoted. Indeed, a rap song with similar lyrics reportedly provoked the gang rape of the so-called Central Park jogger in New York City in the spring of 1989. The men convicted of the crime testified that they did it because "[i]t was something to do.

¹²⁶ See also, e.g., Melinda Vadas, *A First Look at the Pornography/Civil Rights Ordinance: Could Pornography Be the Subordination of Women?* 1987 J. OF PHILOSOPHY 487; Rae Langton, *Speech Acts and Unspeakable Acts*, 22 PHIL. & PUB. AFFAIRS 293 (1993).

¹²⁷ See *Hall v. Gus Construction Co.*, 842 F.2d 1010 (8th Cir. 1988); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991).

¹²⁸ George F. Will, *America's Slide into the Sewer*, NEWSWEEK, July 30, 1990, at p. 64 (quoting "Me So Horny" by 2 Live Crew).

It was fun."¹²⁹ One must question whether such misogynist invective can realistically be countered in the marketplace of ideas, particularly within the relatively limited market-place or community in which the perpetrators of that crime lived.

V. English Legal Analysis of Hate Speech

English law has in the past featured both civil and criminal provisions, common law and statutory actions, for addressing the type of offense I have labelled extremist or hateful speech. Currently, most such criminal provisions have been combined in the Public Order Act of 1986.¹³⁰ The common law civil action for group libel is still recognized by courts, though rarely used.¹³¹

While English judges more frequently allude to a common law principle of freedom of speech than they formerly did, they are far less likely than American judges to discuss philosophical or other justifications for the principle.¹³² Thus, it is more difficult for any commentator to know with certainty the goals which the English judiciary wish to advance by their continuing embrace of the principle, or by their willingness to infringe it in some instances.

A. *The Public Order Act of 1986.*

The Public Order Act of 1986 contains various provisions that may be relevant to a discussion of sexually hateful speech. In addition to the express abolition of various dis-used and disfavoured common law offenses such as riot, rout, unlawful assembly and affray, along with the

¹²⁹ Will, *America's Slide*, *supra*.

¹³⁰ PUBLIC ORDER ACT 1986, § 18, in *Public General Acts and Measures of 1986* (Part IV, Ch. 64) (HMSO 1987).

¹³¹ BARENDT, *FREEDOM OF SPEECH*, *supra* note 12, at 166.

¹³² See BARENDT, *FREEDOM OF SPEECH*, *supra* note 12, at 29-31.

statutory restatement of some of those offenses, the Act also consolidated and strengthened laws related to racial hatred offenses that had previously been scattered in various acts.¹³³ The Criminal Justice and Public Order Act of 1994 provided a basis for prosecuting purveyors of sexually hateful speech in public and in most private places. In some ways, consideration of the Act through a gendered lens is an artificial exercise because the Act's drafters were almost certainly not concerned with deterring sexually hateful speech. Nor were they necessarily concerned with redressing the sort of injuries that misogynist speech causes, an oversight or failure that is, of course, significant in and of itself. Still, it is useful to consider whether the various provisions of the Act might serve either of these purposes.

Part III of the Public Order Act 1986 is the section which includes modified versions of the previously scattered laws related to racially hateful speech. Amending the earlier law, section 18 of the Act provides that

A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting is guilty of an offence if

(a) he intends thereby to stir up racial hatred, or

¹³³ Expressions of racial hatred were first criminalized in Britain in the Race Relations Act of 1965 § 6, discussed in D.G.T. Williams, *Racial Incitement and Public Order*, 1966 CRIM. L. R. 320; P. Leopold, *Incitement to Racial Hatred--The History of a controversial Offense*, 1977 PUBLIC LAW 389.

This legislation was soon found to be problematic and was amended in 1976, at which time it was placed into the legislative context of the Public Order Act of 1936. Other laws related to racial hatred were to be found in the Theatres Act 1968 and the Cable and Broadcasting Act 1984.

For an excellent discussion of various aspects of the Public Order Act 1986, see A.T.H. SMITH, *OFFENCES AGAINST PUBLIC ORDER, INCLUDING THE PUBLIC ORDER ACT 1986* (1987); see also AVROM SHERR, *FREEDOM OF PROTEST, PUBLIC ORDER AND THE LAW* (1989).

(b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.¹³⁴

Subsequent sections of the act define similar offences for publication or portrayal of material with the intent or likely effect of stirring up racial hatred.¹³⁵ Additionally, the possession of racially inflammatory material is prohibited if the prosecution can show that the person possesses it "with a view to" publishing or distributing it. Again, intent to stir up racial hatred or knowledge that this will be the likely effect is an element of the offence.¹³⁶

"Racial hatred" is defined as "hatred against a group of persons in Great Britain defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins."¹³⁷ Parliament made a deliberate decision to exclude religious groupings,¹³⁸ though apparently it never considered the harms associated with sexually hateful speech. The law is considered to be justified by the need to protect minority groups from the offence of such speech.¹³⁹ Prosecution under it requires the Attorney General's consent, which is not lightly granted.¹⁴⁰

¹³⁴ PUBLIC ORDER ACT 1986, § 18(1).

¹³⁵ *Id.* at §§ 19-22.

¹³⁶ *Id.* at § 23.

¹³⁷ *Id.* at § 17.

¹³⁸ Law Commission W.P. No. 79, *Offences Against Religion and Public Worship* (1981), ¶¶ 5.9-5.11 and 8.5.

¹³⁹ Home Office Review of the Public Order Act 1936, ¶ 107.

¹⁴⁰ Between 1977 and 1980, fifteen people were prosecuted for the offence. BARENDT, *FREEDOM OF SPEECH*, *supra* note 6, at 162 (citing Home Office, *Review of the Public Order Act of 1936 and Related Legislation* (1980) Cmnd. 7891, ¶ 106).

While Part III of the Public Order Act indicates no sensitivity to gender issues, another section of the act might be useful for redressing grievances arising from misogynist speech. Section 4, entitled "Fear or provocation of violence", holds that

A person is guilty of an offence if he
(a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or
(b) distributes or displays to another person any writing, sign or other visible representation which is threatening, abusive or insulting,
with intent to cause that person to believe that immediate unlawful violence will be used against him or another by any person, or to provoke the immediate use of unlawful violence by that person or another, or whereby that person is likely to believe that such violence will be used or it is likely that such violence will be provoked.¹⁴¹

The offence may occur in either a public or a private place, excepting dwelling houses.¹⁴²

Section 4, unlike section 17 dealing specifically with racially hateful speech, requires that the speech be directed to a specific person¹⁴³--either provoking that person to violence or threatening and intimidating him or her into believing he or she will be the victim of imminent violence. With section 17, the requirement is less onerous

¹⁴¹ *Id.* at §4 (1). This section would seem to respond to Cynthia Bowman's thesis in *Street Harassment*, *supra* note 7, that there should be redress for what she calls street harassment of women.

¹⁴² *Id.* at §4 (2).

¹⁴³ As to the requirement that a specific person be addressed, one could argue that, in contemplating an equality-type injury (though perhaps less so a psychic/emotional injury) direction at any one person is irrelevant. Indeed, the more widely heard the offensive or degrading comment, the more widespread the harm, *i.e.*, the undermining of the equality norm that feminists are trying to achieve.

because a general broadcast or purveyance is easier to prove than is the targeting of a specific recipient.

Section 4's requirement that a recipient either be provoked to violence or that the recipient believe he or she will be a victim of imminent violence might be said to cut both ways for women at whom misogynist comments are directed. As noted above in relation to the *Chaplinsky* decision in the United States, on the basis of widespread gender stereotypes, one might anticipate that women are less likely to respond violently to a provocation or threat.¹⁴⁴ Perhaps because of this stereotype and women's socialization consistent with it (or their natural propensity, depending on one's stance regarding the nature v. nurture issue), women are indeed less likely to respond in violence. Thus, a woman might have a more difficult task in providing that she would be provoked to "unlawful violence" against the speaker or another. But, by the same stereotyping token, most people would anticipate that women are more likely to experience fear and subjectively feel intimidated or threatened. Thus, a woman might have an easier time meeting that alternative prong of the crime. Accordingly, one could argue that a public prosecutor dealing with misogynist speech might encounter difficulty meeting the first alternative requirement, but considerably greater ease with the second. Perhaps, then, the "masculine" nature of one requirement and the "feminine" nature of the alternative render a gender neutral result.

The dwelling house exception to this section probably reflects a policy decision not to intervene too far into the private (domestic/family) realm of people's lives. It is, after all, a Public Order Act and no doubt reflects the law's long-standing reluctance to regulate acts that occur

¹⁴⁴ See Strauss, *Sexist Speech in the Workplace*, *supra* note 5, at 19 ("The demoralizing effect of the speech itself, which reinforces the role of women as subservient and inconsequential, makes it even less likely that such speech would incite a breach of peace.") See *supra* note 43 and accompanying text.

within the home, while still applying to speech that incites violence in other "private places." As discussed in more detail in Chapter 2, this hesitation to regulate the "private sphere" has often been detrimental to women whose injuries and harms -- rape, domestic abuse, child abuse -- have occurred within the home.¹⁴⁵ On this basis, a sound argument may be advanced that the dwelling house exception to this law renders it ineffective for purposes of assisting women in the very arena in which they are most likely to suffer this sort of verbal abuse. Indeed, the very types of threats and verbal assaults at which this section is aimed are typically the precursors to the sort of physical abuse which other areas of the criminal law are finally punishing. If the harm that the law seeks to prevent is insult, threat and psychic injury to the recipient or hearer, it should not matter whether the prohibited speech takes place inside the home or elsewhere. Of course, it is a *public order* act by name (a comment in and of itself about the law's priorities), but its focus on intimidation of a specific target -- as well as on the incitement to violence -- implicates broader concerns than "public order," concerns that transcend the public-private divide.

Section 4A of the Public Order Act, as amended by the Criminal Justice and Public Order Act 1994, features the most useful provisions for targets or subjects of sexually hateful verbal abuse who are seeking some legal recourse. Titled "[h]arassment, alarm or distress," it provides:

¹⁴⁵ Catharine MacKinnon has discussed the private sphere, noting that the law justifies its nonintervention there by its assumption that it is a sphere of choice for women. However, MacKinnon asserts that "women are guaranteed by the public no more that [they] get in private--that is, what [women] can extract through our intimate associations with men. Women with privileges get rights." CATHARINE MACKINNON, *FEMINISM UNMODIFIED* 100 (1987).

A person is guilty of an offence if with intent to cause a person harassment, alarm or distress, he--

(a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or

(b) displays any writing, sign or other visible representation which is threatening, abusive or insulting,

thereby causing that or another person harassment, alarm or distress.¹⁴⁶

Again, no offence is committed if the activity takes place inside a dwelling house. This section is virtually identical to Section 5 of the Public Order Act of 1986 except that the latter does not require intent to cause the harassment, alarm or distress.¹⁴⁷

As with section 4, these sections may provide potential criminal action against those who make women targets or the predictable recipients of harassing language, including gender-specific taunts and threats. Based on the government's White Paper in relation to the 1986 Act, one may infer that the intent of the law is to punish acts of hooliganism, understanding that such behaviour may harass, alarm or distress witnesses to them. As one commentator has opined regarding the government's thinking on the matter, "victims being weak, vulnerable, or simply law abiding are not likely as a result to resort to violence, however great the provocation by threats, abuse or insults."¹⁴⁸ Such a recognition is significant from a feminist perspective because (contra to U.S. law, as manifested in *Brandenburg v. Ohio*, for example) the lack of a requirement of violent result--or even its likelihood--would tend

¹⁴⁶ CRIMINAL JUSTICE AND PUBLIC ORDER ACT 1994, § 154;

¹⁴⁷ See SHERR, PUBLIC ORDER, *supra* note 133, at 91-96.

¹⁴⁸ SMITH, OFFENCES AGAINST PUBLIC ORDER, *supra* note 133, at 117.

to empower women and others who are predisposed to respond non-violently with a legal redress for the distress-type harms incurred. This decision by the British government to address such an intangible but still very real psychic harm seems to reflect an understanding that incitement to violence is not the only indication that harm has occurred and that physical violence is not the only harm calling for legal recognition and redress.

Whether sections 4A and 5 could be used effectively to prosecute those who harass women verbally, thereby causing them alarm or distress, remains to be seen. The potential seems to be there, but it obviously requires the sympathy of the constables and the courts in understanding that hateful, gender-specific slurs and taunts have great potential to harass, alarm and distress the women at whom they are directed.¹⁴⁹

B. English Tort Law.

While the Public Order Act of 1986 provides some possibilities for criminal prosecution of sexually hateful speech, certain civil suits may also empower women to pursue legal redress against those who harass and intimidate them individually (intentional infliction of emotional distress) or who vilify women as a group (group libel). The seldom-invoked causes of action for intentional infliction of emotional distress and group libel hold greater promise for targets of hate speech in Britain than do similar American tort actions, the latter being subject to such strict First Amendment limitations.

The 1993 case of *Khorsandjian v. Bush*¹⁵⁰ provides greater hope that English courts would, in appropriate

¹⁴⁹ See Bowman, *Street Harassment*, *supra* note 7, at 535-40 (Partly because one-third of U.S. women have been victims of rape or attempted rape in their lifetimes, women have good reason to fear rape, and they do. Women also have good reason to believe that street harassment can serve as a precursor to sexual assault.).

¹⁵⁰ [1993] 3 All E.R. 669.

circumstances, allow suit based upon intentional infliction of emotional distress or some sort of hybrid tort to redress the injury caused by sexually hateful speech. In that case, the court issued an injunction against the male defendant's harassment of the female plaintiff, harassment which had included verbal threats and harassing phone calls as well as following her around and stealing her hand-bag.¹⁵¹

C. English Sexual Harassment Law.

Redress for sexual harassment in England and Scotland is provided for in the Sex Discrimination Act of 1975.¹⁵² Section 1(1)(a) of the Act provides that "[a] person who discriminates against a woman in any circumstances relevant for the purposes of any provisions of this Act if (a) on the ground of her sex he treats her less favourably than he treats or would treat a man." Section 5(3) of the Act triggers a comparison of the treatment of men and women in a given work-place. That is, the relevant circumstances for both men and women should be the same or not materially different. Section 6(2)(b) deals with discrimination in the employment context, stipulating that it is unlawful for an employer to discriminate against a woman "by dismissing her, or subjecting her to any other detriment."

The Court of Session read these provisions together in its 1986 decision in *Strathclyde Regional Council v. Porcelli*,¹⁵³ concluding that acts of sexual harassment against a woman employee by male employees could amount to unlawful sex discrimination under the act. As the Employment Appeal Tribunal (EAT) wrote in its 1994 decision in

¹⁵¹ See Chapter 4 at Sect. VII (discussing case in more detail).

¹⁵² See generally DAVID PANNICK, *SEX DISCRIMINATION LAW*, ch. 7 (1985).

¹⁵³ [1986] IRLR 134 CS.

Stewart v. Cleveland Guest (Engineering) Ltd.,¹⁵⁴ relying on *Porcelli*, the inquiry in sexual harassment cases involves three separate but interrelated elements:

(a) *Treatment*

What was the treatment meted out to the applicant?

(b) *Comparator*

Was the treatment meted out to the applicant less favourable than was or would have been meted out to a man in a similar position to her?

(c) *Sex*

Was the treatment, or any material part of it, meted out to the applicant less favourable on the ground of her sex, ie 'because she was a woman'?¹⁵⁵

The Court of Session in *Porcelli* had concluded that ". . . if a form of unfavourable treatment is meted out to a woman to which a man would not be vulnerable, she has been discriminated against within the meaning of s.1(1)(a). . . . The provisions are concerned with less favourable treatment on the ground of sex, not with the motive or objective of the person responsible for the treatment."¹⁵⁶ In that case, the offensive male conduct included sexually suggestive comments made to the female applicant. There the Court held that the EAT had correctly overruled the Industrial Tribunal's finding that the female employee "had not been discriminated against on grounds of sex when she was subjected to a campaign of unpleasant treatment, including an element of sexual harassment, by two male colleagues."¹⁵⁷ The court clarified that, in cases like the one at hand, "finding that the [employee/applicant] had not been less favourably treated on the ground of her sex

¹⁵⁴ [1994] IRLR 440.

¹⁵⁵ *Stewart*, [1994] IRLR 441 (citing *Porcelli*, [1986] IRLR at 136-38).

¹⁵⁶ *Porcelli*, [1986] IRLR 134.

¹⁵⁷ *Id.* at 134.

because the [colleagues] would have treated a man they disliked equally unfavourable as they treated the [female employee]" was an error.

If the form of the unfavourable treatment or any material part of it . . . included a significant element of a sexual character to which a man would not be vulnerable, the treatment is on the grounds of the woman's sex within the meaning of s.1(1)(a). In the present case, the treatment of the respondent which was of the nature of sexual harassment was adopted because she was a woman. The weapon used was based upon the sex of the victim. . . . Upon a proper application of s.1(1)(a), it was impossible to say other than that the respondent had been treated less favourably on the ground of her sex than a man with whom her position fell to be compared would have been treated."¹⁵⁸

Thus, English law recognizes that sexual harassment, including verbal harassment, may constitute sex discrimination and be redressed as such. A more recent decision by the EAT, however, provides less promise for women seeking to establish such discrimination based on the existence of a hostile work environment. In *Stewart v. Cleveland Guest (Engineering) Ltd.*, the EAT held that an industrial tribunal had not erred in deciding that an employer had not "discriminated against the appellant on the ground of her sex within the meaning of s.1(1)(a) . . . by allowing their male employees to display pictures of partially clothed and nude women in the work-place when they knew that the display was offensive to her or by failing to deal with her complaints properly."¹⁵⁹ The Tribunal went to great lengths to explain the constraints upon it as an appellate body, stating that it could overturn the lower tribunal only if that tribunal had "reached a decision which no reasonable Tribunal, on a proper appreciation of the facts

¹⁵⁸ *Id.* at 135.

¹⁵⁹ *Stewart v. Cleveland Guest (Engineering) Ltd.* [1994] IRLR 440.

and law, would have reached" and only if an "overwhelming case to that effect" were stated by the appellant/employee.¹⁶⁰ Still, certain facts make the case appear quite egregious and the tribunals' responses callous. First, the female employee's initial complaint about the nude posters was treated as trivial, not even worthy of reply by the employer. In response to her second complaint, her employer told her that nothing would be done because it was "not an offence."

Particularly as contrasted with *Robinson v. Jacksonville Shipyards, Inc.*, it appears that English sex discrimination and harassment law may not provide adequate redress for sexually hateful speech in the work-place. This appears to be -- at least in part -- because English courts do not consider the nexus between sexual harassment and sexual discrimination as being as tight as it has come to be considered under U.S. law.

VI. AD HOC BALANCING AS AN ALTERNATIVE, CONTEXTUAL ANALYSIS FOR HATE SPEECH

As illustrated by discussions of the various legal analyses which may be invoked for dealing with sexually hateful speech, the current approach in both Britain and the United States is to pigeon-hole an offensive communication in one or more tort or criminal categories or to treat it as sexual harassment if in the work-place, and then to determine if the communication meets the criteria of the given cause(s) of action. As already discussed, under U.S. law, various constitutional issues potentially arise when any cause of action involves expression such that the cause of action potentially "chills" speech.¹⁶¹ Application of constitutional principles often involves the employment of

¹⁶⁰ *Id.* at 440.

¹⁶¹ See generally David Anderson, *Tortious Speech*, 47 WASH. & LEE L. REV. 71, 75-77 (1990) (discussing what he calls the "categorical model" for dealing with tortious speech).

dichotomies: speech versus non-speech¹⁶², fact versus opinion,¹⁶³ political speech versus nonpolitical speech,¹⁶⁴ speech about public figures versus speech about private figures,¹⁶⁵ media defendants versus non-media defendants¹⁶⁶. Other dichotomies can be identified in

¹⁶² See Steven Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 MICH. L. REV. 1564, 1578-80, 1585-96 (1986) (discussing *Miller v. California*, 413 U.S. 15, 32 (1973)); although this discussion was in the pornography context, much of the analysis applies to the extremist speech context); Post, *Public Discourse*, *supra* note 11, at 632-33; Schauer, *Speech and "Speech"*, *supra* note 15; Fentonmiller, *Sexual Harassment as Equality Depriving Conduct*, *supra* note 6, at 568, 596 n. 142 ("[s]exually abusive speech in the workplace . . . creates a communally shared set of meanings, a workplace ethos, that defines a harassment victim as inferior to her opposite sex counterpart"; sexually hateful "words are not only evidence of sex discrimination, but are the discrimination." (citing *Harris v. Forklift Sys., Inc.*, 114 S.Ct. 367, 371 (1993))).

¹⁶³ See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). For an interesting comment on the fact or opinion status of sexually hateful epithets, see Fentonmiller, *Verbal Harassment as Equality Depriving Conduct*, *supra* note 6, at 587, noting that harassing speech includes propositions that may be deemed true or false, i.e., "women are only good for sex Even derogatory epithets like 'bitch' and 'dragon lady', when ascribed to a person, are as a logical matter capable of truth or falsity." Nevertheless, protecting such speech on this basis would be "arbitrary. . . . What the sexually abusive language does in the work place -- coerce women and define them as unequal -- not its grammatical structure, is the critical factor in creating a hostile environment."

¹⁶⁴ See, e.g., *Landmark Communications v. Virginia*, 435 U.S. 829, 838 (1978); *Whitney v. California*, 274 U.S. 357 (1927); see generally Harel, *A Theory of Unprotected Speech*, *supra* note 7.

¹⁶⁵ See, e.g., *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988); *New York Times v. Sullivan*, 376 U.S. 254 (1964).

¹⁶⁶ *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985); see also Comment, *Defamation and the Nonmedia Speaker*, 41 FED. COMM. L.J. 195 (1989) (arguing that media-nonmedia distinction should be abolished in defamation cases).

typical hate speech analysis: public speech versus private communication¹⁶⁷; and speech to a group versus a hateful face-to-face encounter;¹⁶⁸ speech inciting violence versus that not doing so. The resultant matrix of doctrines and principles might be considered a codification of sorts of First Amendment law.¹⁶⁹ This taxonomy epitomizes masculine dichotomous thinking,¹⁷⁰ its relatively neat and tidy categorization frequently obscuring the essence of the conflict, its context, and the resultant harm.

Consider, for example, the following statement: "Fucking cunt! All women are whores and they can't be trusted." If this is spoken privately to an individual woman, perhaps beginning "You Fucking Cunt . . .", it could give rise to a cause of action for intentional infliction of emotional distress. It is likely, however, that the cause of action will not survive the defendant's summary judgement motion, as the court will rationalize that it is a private matter between two people and, perhaps, does not rise to the degree of outrage generally associated with emotional distress actions.¹⁷¹

If it is made in the work-place, the statement may give rise to a sexual harassment or sex discrimination action. However, if it is the only such offending state-

¹⁶⁷ See Bowman, *Street Harassment*, supra note 7, at 558-63 (fighting words), 574.

¹⁶⁸ See Bowman, *Street Harassment*, supra note 7, at 549-69; Volokh, *Workplace Harassment*, supra note 7, at 1863-70.

¹⁶⁹ Some refer to this system as definitional balancing. Speech is defined as a certain type, and then weighted accordingly for constitutional purposes. For example, if speech is defined as defamatory, it enjoys only limited constitutional protection. See generally Lasson, *Abusing the First Amendment*, supra note 8, at 27.

¹⁷⁰ See supra Chapter 2 at Sects. IV and VI.

¹⁷¹ Such a judgement is, I daresay, more likely to be made by a male judge; see *Swentek v. U.S.Air*, discussed supra at notes 79-84, 104-06.

ment or action to have passed between the parties, the action may well fail for lack of a pattern of such activity, which is generally necessary to establish a hostile working environment and therefore liability under Title VII. The variety of harms that can result from just a single comment is really not considered. Still, it is heartening that sexual harassment is now a legally cognizable injury under Title VII -- and that it is largely shaped by women's experiences and perceptions.¹⁷² The English precedents offer somewhat less encouragement, although there are signs that industrial tribunals are becoming more sensitive to the issue of misogynist speech and to women's perceptions of gender-based hostility in their work-places.

If the hypothetical statement is made in public, perhaps to a large audience, it could give rise to an action for group libel, assuming that a state statute provides for such a cause of action. Such a widely communicated statement might even provoke prosecution under an obscenity statute, though it is very unlikely. In either case, constitutional issues would immediately arise if in a U.S. setting. Under a group libel analysis, the doubtful precedent of *Beauharnais* will likely give way to a *Brandenburg-Cohen* "imminent incitement to lawlessness" analysis. If the statute is not scrupulously aligned with the principle that violence -- the only *legally recognized* harm in this context -- is likely to result directly and immediately from the offensive speech, the law will be deemed unconstitutional and prosecutions under it cannot proceed.

Similarly, any obscenity statute invoked to prosecute the communicator will be subject to the strict constitu-

¹⁷² This recognition of sexual harassment as sex discrimination is largely attributable to the work of Catharine MacKinnon, co-counsel for Mechelle Vinson in *Meritor Savings Bank v. Vinson*. See generally MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 97, at 103; Note, *The Reasonable Woman Standard: Preventing Sexual Harassment in the Workplace*, 18 WM. MITCHELL L. REV. 795 (1992).

tional scrutiny outlined in *Miller v. California*.¹⁷³ Under the *Miller* precedent, a work is obscene only if it meets three criteria: taken as a whole appeals to prurient interest; depicts or describes in a patently offensive way sexual conduct; and taken as a whole lacks serious literary, artistic, political or scientific value. Significantly, none of the tests directly considers the resultant harms for women.

The focus is on the speech, not on that which results from it, not on the harms it may cause. In the application of these free speech doctrines, the resultant injury suffered by the woman (or other victim) is lost in the shuffle of further delineating the boundaries of what is and is not protected speech, and, if speech is protected, the conditions under which that protection wanes. Accordingly, courts have rarely devoted serious consideration to the relevant and probative psychosocial and psycho-linguistic studies which bolster the thesis that long-term, diffuse harms, as well as shorter-term direct injuries, do result from speech derogatory of a historically marginalized group.¹⁷⁴ Nor do the courts, perhaps with the excep-

¹⁷³ 413 U.S. 15 (1973).

¹⁷⁴ As Professor Patricia Williams has opined, "[t]he attempt to split bias from violence has been this society's most enduring rationalization." Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 MIAMI L. REV. 127 (1989). See, e.g., W. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812* (1968); J. KOVEL, *WHITE RACISM: A PSYCHOHISTORY* (1970); Greenbert & Pyszczynski, *The Effect of an Overheard Ethnic Slur on Evaluations of the Target: How to Spread a Social Disease*, 21 EXPERIMENTAL SOC. PSYCHOLOGY 61, 70 (1985); L. Fergenson, *Group Defamation, From Language to Thought and Action* (unpublished paper presented at the Hofstra University Conference on Group Defamation & Freedom of Speech, Apr. 21, 1988) (citing H. CLARK & E. CLARK, *PSYCHOLOGY AND LANGUAGE: AN INTRODUCTION TO PSYCHOLINGUISTICS* (1977)), cited in Matsuda, *Considering the Victim's Story*, *supra* note 1, at 2339; Cheryl Benard & Edit Schlaffer, *The Man on the Street and Why He Harasses*, in *FEMINIST FRAMEWORKS: ALTERNATIVE THEORETICAL ACCOUNTS OF THE RELATIONS BETWEEN WOMEN AND MEN* (Alison Jaggar & Paul Rothenberg eds., 2d ed. 1984); Carol Gardner, *Passing By: Street Remarks, Address Rights, and the Urban*

tion of sexual harassment cases, explicitly consider direct harms to women.¹⁷⁵

The sterile legal analysis rendered by these complex categorizations also deters consideration of the human and relational factors in cases, applying abstract legal rules to facts often excised from their reality, often taken out of context. Focus on this aspect of free speech doctrine reveals the doctrine's masculinity. This is partly because U.S. constitutional jurisprudence has accorded such a great presumption in favour of the individual's right to free speech, which, pitted against the lesser value accorded the collective right of women (as well as to other historically disadvantaged groups) to freedom from harassment and to a meaningful equality, makes for not much of a contest. The categorization of speech appears little more than an exercise for appearances' sake; the primacy of the free speech principle in U.S. constitutional jurisprudence precludes all but negligible consideration of any competing factors. Feminists are, justifiably, suspicious because those who most vigorously defend the inviolability of the First Amendment are also those who have enjoyed the social power to optimize the right it confers.¹⁷⁶

Female, 50 Soc. INQUIRY 328 (1980); James Gruber & Lars Bjorn, *Women's Responses to Sexual Harassment: An Analysis of Sociocultural, Organizational, and Personal Resource Models*, 67 Soc. SCI. Q. 814 (1986); Bowman, *Street Harassment*, *supra* note 7; Fentonmiller, *Sexual Harassment as Equality Depriving Conduct*, *supra* note 6.

¹⁷⁵ If they did, as Cynthia Bowman has argued, the "value of harassment to men who enjoy it simply does not outweigh its detrimental impact on women and society." Bowman, *Street Harassment*, *supra* note 7, at 543.

¹⁷⁶ See Kelven, *Struggle for Power*, *supra* note 7; see also Jane Larson, *Third Wave*, *supra* note 121, at 1257 (discussing Hirshman and Greene's articles in the same symposium and noting that it is not enough for women to be the objects of men's justice; they must be represented among those who have the power to determine what justice is); Fentonmiller, *Sexual Harassment as Equality Depriving Conduct*, *supra* note 6, at 573-79. Cf. Kingsley Browne, *Title VII as Censorship: Hostile-Environment Harassment*

The relational or cultural feminist critique of law, inspired by the work of Carol Gilligan,¹⁷⁷ questions the fairness of the result rendered by such dichotomous modes of analysis. By contrast, a legal system attuned to people, their relationships, their problems, their context -- an *ad hoc* balancing or analysis -- would seem to yield more just results. Such a system's focus on context resists solution by categorization. The *ad hoc* balancing system used in some First Amendment contexts¹⁷⁸ might therefore prove to be more attuned to feminist goals and methods.¹⁷⁹ Martha Minow, a foremost proponent of such a contextual approach, quips that it "won't tell us what to do; it may even make things seem more complicated."¹⁸⁰

and the First Amendment, 52 OHIO ST. L.J. 481, 489 (1991) (arguing that being called a "dumb bastard" or a "red-headed bastard" is as offensive as being called a "dumb bitch"; this ignores or implicitly rejects the argument that the cultural assumptions associated with being a woman are different than those associated, for example, with having red hair.)

¹⁷⁷ For a comprehensive discussion of Gilligan's work, as well as the relational/cultural feminism that has developed from it, see *supra* Chapter 2, at Sect. IV.

¹⁷⁸ See generally David Anderson, *Tortious Speech*, 47 WASH. & LEE L. REV. 71, 87-97 (1990) (discussing *ad hoc* balancing in the commercial speech context and hypothesizing its application in privacy cases); cf. Lasson, *Abusing the First Amendment*, *supra* note 8, at 27-28 (noting that *ad hoc* balancing can fail to accord sufficient weight to speech interests, thus reducing First Amendment protection).

¹⁷⁹ See Fentonmiller, *Sexual Harassment as Equality Depriving Conduct*, *supra* note 6, at 569, 588-98 (stating that in the few cases in which the U.S. Supreme Court has simultaneously addressed the First Amendment and equality interests reveal a precedent of not forsaking equality for absolute free speech; noting the labor relations, *YKK (U.S.A.), Inc.*, 269 N.L.R.B. 124, 127 (1948), and public employee, *Rankin v. McPherson*, 483 U.S. 378, 383 (1987), contexts).

¹⁸⁰ Martha Minow, *Looking Ahead to the 1990s: Constitutional Law and American Colleges and Universities* 4 (June 28, 1989) (transcript on file at Harvard Law School Library), cited in Note, *First Amendment--Racist and Sexist*

But, a legal system valuing both freedom and equality should "reject the rigid dictates of categorization and explore more sophisticated methods to balance clashing interests."¹⁸¹

One commentator has observed that while "[c]ontextual analysis has replaced the 'dry and sterile formalism'¹⁸² of categorical approaches in virtually every sphere of constitutional law", constitutional analysis of hateful speech "remains a lonely exception, largely because of the fear that ad hoc balancing" would insufficiently protect free speech interests.¹⁸² Such great deference to the free speech ideal, however, appears to leave women, as well as the equality principle, inadequately protected.

Ad hoc balancing, being more attentive to and reliant upon contextual consideration of the objectionable communication, the speaker, and any recipients, is consistent with a strand of feminism that I refer to, in Chapter 2, as standpoint/positional epistemology. It is also reflective in some ways of Gilligan's relational or cultural feminism. The former feminist analysis is focused on ways of knowing; as explained in Chapter 2, it is pro-experience and anti-abstraction. Generally speaking, this analysis relies heavily upon "story-telling", upon individual women's descriptions of their experiences as a means of identifying "truths."¹⁸³ In the context of sexually hateful speech,

Expression on Campus--Court Strikes down University Limits on Hate Speech, 103 HARV. L. REV. 1397, 1402 (1990) (citation omitted) (noting *Doe v. University of Michigan*, 721 F.Supp. 852 (E.D.Mich. 1989)).

¹⁸¹ *Id.* at 1402.

¹⁸² *Id.*

¹⁸³ See generally Matsuda, *Considering the Victim's Story*, *supra* note 1; Kathleen Lahey, . . . *Until Women Themselves Have Told All They Have to Tell . . .*, 23 OSGOODE HALL L.J. 519 (1985); Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191 (1989); Jane Larson, *Imagine Her Satisfaction: The Transformative Task of Feminist Tort Work*, 33 WASHBURN L.J. 56 (1993).

the story-telling is useful because, by reciting the incidents of hate speech to which they have been exposed, by articulating how it made them feel, and by identifying the injuries suffered, the focus shifts from speech as a legal concept to *the speech* that is at issue--its meaning or, more precisely, the essence of the communication¹⁸⁴; the context in which it was spoken; and the level of invective it represents. In addition, the focus upon the woman's perceptions regarding the speech, herself, and her reaction to the speech, brings the analysis a step closer to according the proper weight to the equality principle and to the harms that may be associated with such speech. Because *ad hoc* balancing appears more consistent with feminist goals than the current categorization/definitional approach, it is appropriate to consider further some of the factors to be weighed and considered in that balance.

A. The Direct and "Diffuse" Harms of Sexist Speech

As already noted, *ad hoc* balancing in the hate speech context may bring more clearly into focus the competition between the benefits and harms wrought by certain types of speech. As feminist scholar Adrian Howe has noted, gaining legal recognition for a gender-based (or usually gender-specific) injury is often an important first step in making

¹⁸⁴ Catherine MacKinnon uses this example. Saying to someone, "I'm going to fuck you even if I have to rape you," is as much about the speaker "getting off" on saying it and contemplating and experiencing the target's response as it is an actual threat of rape. CATHERINE MACKINNON, *ONLY WORDS* 58, nn. 47-48 (1993). Indeed, I would say it is usually more the former than the latter. Consider another example. A man calls a woman a "fucking cunt." He is not asserting the fact that she is, actually, a vagina. He is expressing with enormous vitriol his disgust and contempt for her by labelling her a body part, in particular, a part of her genitalia. See generally Fentonmiller, *Verbal Harassment as Equality Depriving Conduct*, *supra* note 6, at 587, 594.

the law work for women.¹⁸⁵ This is, however, seldom an easy or simple task. The law resists recognition of harms unless they are comprehensible to a white, masculine, liberal jurisprudence,¹⁸⁶ which is hardly surprising since these are the people who have been in power, making the law. Essentially, then, injuries have traditionally been comprehensible to white, middle class males -- if only to white, middle class males. As illustrated by the following discussion, this is rarely the case with harms that result from hate speech because even when white, Anglo-Saxon Protestant ("WASP") men are the targets of verbal abuse, their superior stature in society's hierarchy immunizes them, at least to an extent, from psychic injury. Their social power is generally adequate to make them resilient in the face of verbal attacks from those who are their equals -- or social subordinates as the case may be.¹⁸⁷

¹⁸⁵ Adrian Howe, *'Social Injury' Revisited: Towards a Feminist Theory of Social Justice*, 14 INT'L J. OF SOCIOLOGY OF LAW 423 (1987), discussed in chapter 1, *supra*; see also Lucinda Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J. OF L. & FEMINISM 41 (1989); Joyce McConnell, *Incest as Conundrum: Judicial Discourse on Private Wrong and Public Harm*, 1 TEX. J. WOMEN & LAW 143 (1992). Gaining legal acknowledgement of heretofore ignored harms is, however, much easier said than done. While MacKinnon's work was instrumental in gaining legal recognition for the gender-based harm of sexual harassment, she has not been successful with her efforts to gain legal recognition for the harms which production, distribution, and consumption of pornography cause women. See generally MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 97, at 103-116, 127-213.

¹⁸⁶ See generally Robin West, *Jurisprudence and Gender*, 55 U.CHI. L. REV. 1, 58-59 (1988); Bowman, *Street Harassment*, *supra* note 7, at 520, 551-55; see also Jaclyn Packer, *Sex Differences in the Perception of Street Harassment*, 5 WOMEN & THERAPY 331 (1986).

¹⁸⁷ See generally Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2326-27 (1989) (noting that law review articles suggesting restriction of hate speech are typically written by members of groups that have been victims of such speech); Fentonmiller, *Verbal Harassment as Equality Depriving Conduct*, *supra* note 6, at 575, n. 45 (discussing

Kent Greenawalt has written extensively about the injuries that may result from hate speech, and he does not take lightly harms such as offence, emotional distress, and what he calls "diffuse harms."¹⁸⁸ In addition to the potential for violence created by such epithets, Greenawalt identifies three other specific harms that may arise from hateful speech: (1) psychic injury to those targeted, (2) offense to others who hear, and (3) the "insidious effect on social relations, reinforcing prejudice and contributing to unjust discrimination, generating resentment and undermining self-esteem" amongst those who identify themselves according to membership in a group targeted by such speech.¹⁸⁹

Only provocation to violence, however, is taken seriously by both U.S. and British law. In Britain, it is an element of various offenses within the Public Order Act of 1986.¹⁹⁰ In the United States, it is manifested most obviously in the *Brandenburg* "incitement to imminent violence" test.¹⁹¹ The U.S. and English standards differ in terms of the time element, with the former requiring an imminent danger, and the latter being less specific about

the difference between calling someone a "dumb redhead" or a "dumb bastard" and calling someone a "dumb bitch" because of the cultural baggage associated with the female); *but see* Browne, *Title VII as Censorship*, *supra* note 176, at 489.

¹⁸⁸ GREENAWALT, *USES OF LANGUAGE*, *supra* note 8, at chs. 8, 17.

¹⁸⁹ GREENAWALT, *USES OF LANGUAGE*, *supra* note 8, at 143; *see also* Bowman, *Street Harassment*, *supra* note 7, at 540-42; Fentonmiller, *Verbal Harassment as Equality Depriving Conduct*, *supra* note 6, at 577 ("sexually harassing words immediately invoke a context, history, and a set of stereotyped assumptions about women").

¹⁹⁰ *See supra* Sect. V(A).

¹⁹¹ *See supra* notes 37-38 and accompanying text.

the temporal element.¹⁹² As previously discussed, limiting the recognized harms to a violent reaction could easily be judged a "male" standard: as a very general rule, again reflecting widely held gender stereotypes, men are expected to respond to indignities and insults with violence; women, who are more likely to internalize the pain, suffer psychic injury.¹⁹³ Accordingly, when most of those in an audience are women, violence is less likely to result, even if the offensive or outrageous statement is a gender-specific attack on them as a group or on one of them as an individual. Of course, a strict reading of the hostile audience doctrine renders this fact irrelevant, as the litmus test is the reaction of the audience to others, not the speaker. Still, provocation to violence is a masculine standard, acknowledging harms that men consider to be real and significant. That standard should be redefined to correspond to some level of offensiveness or outrageousness as judged by a gender neutral standard, as with the reasonable (or reasonably caring) person standard.

If, on the other hand, misogynist invective is directed at a group of men, they could react in any number of ways, probably depending to great extent on individual predisposition and character. It is unlikely that a riotous mass assault on women will occur then and there, thus failing *Brandenburg's* imminence test. Individual men may well be inspired, however, to carry out individual acts of violence on individual women, some within a very short

¹⁹² For a discussion of the temporal element in tort law and how it is sometimes viewed differently by women than by men, see Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV. 575, 587-88 (1993) (discussing work of Ann Scales, *Feminists in the Field of Time*, 42 FLA. L. REV. 95, 98-99 (1990)).

¹⁹³ See Bowman, *Street Harassment*, *supra* note 7, at 560-62.

time of hearing the message.¹⁹⁴ Alternatively, they may be encouraged to victimize women in other ways--by street and work-place harassment or employment discrimination -- causing harms that will be discussed more fully below. As Greenawalt has hypothesized, misogynist rhetoric spoken among an all-male group may be harmful indeed in the long run because of the power in re-enforcing male prejudices.¹⁹⁵

Then there is the related issue of slurs occurring in a face-to-face encounter, rather than in a group setting. While such confrontations are more likely to cause the type of harm at which the intentional infliction of emotional distress tort is aimed, they would seem to have little effect on anyone other than the two people involved in the confrontation. While physical violence often accompanies such verbal violence, this is not usually the case because the recipient of the verbal attack responds with it; rather, it is because the one who is verbally aggressive is also behaving in a physically aggressive manner.¹⁹⁶ Indeed, in this setting hateful remarks come very close to action, and insults delivered one-on-one are damaging

¹⁹⁴ See Bowman, *Street Harassment*, *supra* note 7, at 535-36. See also sources cited at *supra* note 174 (psycholinguistic and other studies of the long term effects of racist speech). Even if such violent acts are not carried out within some reasonably short time, the communication/speech may still incite future violence. Such violence, even though temporally removed, should not be discounted and is not necessarily unrelated to or distinct from the speech. The expression of women's alternative perceptions of time and causality is one way women's voices are being brought to bear on traditional tort law and concepts.

¹⁹⁵ GREENAWALT, *USES OF LANGUAGE*, *supra* note 8, at 148.

¹⁹⁶ Potential rapists frequently select their victims by looking for women who appear vulnerable to assault, and may approach a potential victim and "test" her by making lewd, insinuating remarks, to see if she can be intimidated. See Carol Dana, *Talking Back to Street Harassers*, WASH. POST Aug. 19, 1986, at C5; Cristina Del Sesto, *Our Mean Streets: D.C.'s Women Walk Through Verbal Combat Zones*, WASH. POST, Mar. 18, 1990, at B1.

psychic assaults.¹⁹⁷ The second type of injury, psychic or emotional damage to those who are targets of the offensive speech, has come to be taken more seriously in recent years. With increased acceptance of torts like intentional infliction of emotional distress, itself considered a "gendered" development,¹⁹⁸ the judiciary has conceded that tangible physical harms are not the only ones worthy of redress. While we have come to accept that racial or ethnic slurs such as "nigger" or "kike" can cause injury to those targeted by them, society seems less sensitized to words that wound women, as women. This may be, sadly, because such words are so prevalent in modern common parlance. As has been noted about women's unique perspective and the recognition of injury in the sexual harassment context, "the fact that the sexual harasser so closely resembles the boss in his ordinary mode . . . should [] be used . . . to undermine the legitimacy of power, not to defend harassers as obviously noncriminal."¹⁹⁹ The same should apply to all who verbally harass women, both in and out of the work-place. Instead of excusing such speech as normal or acceptable simply because it is common, the law should decry such behaviour, undermining the power of the perpetrator in our social hierarchy.

¹⁹⁷ See GREENAWALT, *USES OF LANGUAGE*, *supra* note 8, at 144-45; Bowman, *Street Harassment*, *supra* note 7. Professor Smolla has said that racial "slurs rape the soul", again graphically bringing home the act-like character of some speech. Smolla, *Rethinking Sexist Speech*, *supra* note 29, at 177. See also EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION*, *supra* note 26 (similar statement regarding pornography).

¹⁹⁸ Martha Chamallas and Linda Kerber, *Women, Mothers, and the Law of Fright*, 88 MICH. L. REV. 814 (1990).

¹⁹⁹ Mark Kelman, *Criminal law: the origins of crime and criminal violence*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (David Kairys ed. 1982).

But whose reaction -- offense or lack of offense -- matters? Is it a subjective or objective inquiry?²⁰⁰ Is it even relevant to ask how tough an ordinary person must be, or should a defendant have to take the plaintiff as he or she is, as the general tort principle mandates?²⁰¹ Here again, gender implications are identifiable in the sense that the less socially powerful group, women, are far more likely to experience and therefore lend legal credibility to the injury caused by sexually hateful speech than are men, who enjoy greater power in the social hierarchy.

Hateful speech can be even more harmful if the recipient feels intimidated by it. A woman who is called a "bitch" or "slut" by an angry man may reasonably feel that she is in imminent danger of assault, sexual or otherwise.²⁰² In these cases, the harm to the listener -- even in the absence of violence -- is greatly increased because of the anxiety provoked. The more vulnerable the woman's situation, the greater the potential for injury, whether psychic, physical or both.²⁰³

²⁰⁰ See generally Matsuda, *Considering the Victim's Story*, *supra* note 1; Smolla, *Rethinking Sexist Speech*, *supra* note 28, at 176-78 (advocating greater consideration of the victim's perspective); Note, *The Reasonable Woman Standard*, *supra* note 172; see also *Burns v. McGregor Industries, Inc.*, 807 F.2d 506, n. 3 (8th Cir. 1993) (adopting the "reasonable woman" standard in hostile environment Title VII litigation and citing cases). Cynthia Bowman encourages us to consider a woman's perspective of street harassment. Bowman, *Street Harassment*, *supra* note 7, at 535-40.

²⁰¹ Cynthia Bowman has asked if, when one-third of women in the U.S. have been or will be victims of sexual assault in their lifetimes, are women "eggshell" plaintiffs if they react in a way that is "out of proportion" to a verbal assault? Bowman, *Street Harassment*, *supra* note 7, at 536-37.

²⁰² See GREENAWALT, *USES OF LANGUAGE*, *supra* note 8, at 145; Bowman, *Street Harassment*, *supra* note 7, at 535-40.

²⁰³ Bowman, *Street Harassment*, *supra* note 7, at 542.

The third injury which may arise from extremist speech is offense to the listener.²⁰⁴ As with pornography, some people may be disturbed just to know that such communications are out there in the marketplace of ideas. The level of offense, if any, often depends on the nature of the audience. In fewer and fewer settings are people these days seriously offended by solitary words, used randomly, like "fuck", "spic", or "cunt." Certainly they still carry some shock value, but it is limited; some audiences would not even blink at the use of such language. Perhaps, as noted above with regard to injury to one targeted by such speech, this de-sensitization is a bad sign. It may not be so much that we have learned to live and let live as that we have begun to ignore or repress certain harms. Still, redress for mere offence or prudishness, as opposed to psychic injury to one who is a target of the vitriolic speech, is very difficult to justify.²⁰⁵ The more compelling cases related to this type of injury, similar to the analysis in obscenity cases, are those instances in which an audience may be considered captive or in fora where it is particularly important that the level of discourse remain reasoned and rational.

The fourth type of injury is the most difficult to grapple with from a traditional tort perspective because of the causation issues it raises. As Greenawalt has recognized, slurs that demean on the basis of race, ethnicity, religion or gender have the potential to "reinforce prejudices and feelings of inferiority in seriously harmful ways

²⁰⁴ See generally GREENAWALT, *USES OF LANGUAGE*, *supra* note 8, at 146.

²⁰⁵ I am reminded of Rae Langton's comments about what is and is not an important issue in a discussion of pornography law. She contrasts her concern about the well-being of women with Ronald Dworkin's concern about the embarrassment of the "shy pornographer." Langton, *Whose Right?*, *supra* note 17, at 23. The analogy is not perfect, but similarly I am far less concerned that this sort of language will make a Sunday school teacher blush than I am about its long-term, diffuse harms to women.

and [to] reduce the level of reason in public discourse."²⁰⁶ In these cases, the characteristics of the audience members are not as significant as in other scenarios. The key aspect of the harm is that those who are exposed to hateful communications about a particular group may believe the negative propaganda and perhaps eventually act on it.²⁰⁷ Members of the denigrated group are potentially injured in several ways. They suffer psychic injury and decreased self-esteem not only by hearing such speech about them, but failing that, knowing that such attitudes prevail.²⁰⁸ This can be carried a step further to posit that those who historically have been the victims of discrimination will suffer further setbacks in their quest to be heard and to gain an equal voice. Not only can such hateful communication be debilitating to them in terms of the blow to their self-esteem and their desire to assert themselves, it generally also lowers them in the esteem of others so that they are accorded less credibility, less dignity in their relations. Unfortunately, the capacity of hate speech to cause deeply scarring psychic wounds or to undermine the value of equality are discounted by the law as harms "too ephemeral to justify content-based speech restrictions."²⁰⁹

B. The "Value" of Extremist Speech

Under U.S. First Amendment legal analysis (so-called definitional balancing or categorization), the type of speech at issue, e.g., political defamatory, obscene, inciting violence, is first identified and then the commu-

²⁰⁶ GREENAWALT, *USES OF LANGUAGE*, *supra* note 8, at 148.

²⁰⁷ Bowman, *Street Harassment*, *supra* note 7, at 540-42.

²⁰⁸ See *supra* note 174 and accompanying text (noting the psycholinguistic and psycho-social studies exploring the effects of such speech on the historically disadvantaged group which it attacks).

²⁰⁹ Smolla, *Rethinking Sexist Speech*, *supra* note 29, at 172 n.3.

nication is weighted accordingly. For example, at one time defamation received no First Amendment protection whatsoever; now it receives varying degrees of protection depending on the public or private status of the plaintiff and a few other factors. Still, its merit for free speech purposes is determined by its place in the constitutional matrix.

By the same token, political speech occupies a revered place in the taxonomy. Thus, if we attempted to categorize the speech in cases such as *Swentek*, *Hall*, *Branda*, and *Smith* (discussed above in Sect. IV(B)(2)), according to whether or not it was political speech, contributing to public discourse (which I will define for purposes of this discussion as debate about the search for truth regarding some issue of societal importance)²¹⁰ we might, at first blush, assume that it is not political speech.²¹¹ In truth, this probably is political speech because its true meaning or, if you will, sub-text (even if the speaker is not conscious of it) is essentially that women should be or are subservient to men, or that "woman's place is in the

²¹⁰ Some would define "public discourse" more narrowly. For example, Alexander Meiklejohn has written that "[t]he First Amendment does not protect a 'freedom to speak.' It protects the freedom of those activities of thought and communication by which we 'govern.'" Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255, discussed in Stern, *Pluralistic Reading of the First Amendment*, *supra* note 10).

Robert Post has stated that the distinction between so-called public discourse and other types of speech is, "[i]n contemporary doctrine . . . notoriously ill-conceived and unreliable." He explains that the U.S. Supreme Court has "most comprehensively attempted to define public discourse by distinguishing speech about 'matters of public concern' from speech about 'matters of purely private concern.'" Robert Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 Harv. L. Rev. 601, 667 (1990). See also Alon Harel's definition of the narrower concept of "political discourse," at *supra* note 14.

²¹¹ See, e.g., Volokh, *Workplace Harassment*, *supra* note 7, at 1824-26.

home."²¹² It is therefore essentially a political comment or opinion and in the constitutional taxonomy is entitled to the ultimate degree of First Amendment protection.

An *ad hoc* balancing approach to extremist speech cases, as proposed above, would require a more direct assessment of the value of the specific, offending speech in any given case. At the risk of lapsing back into a regime of categorization, it seems necessary to state some criteria for determining the value in speech. Prof. Rodney Smolla has stated a useful taxonomy for ascertaining the "constitutional value" of speech.²¹³ Commencing with an examination of the purpose of law, Professor Smolla expresses skepticism for the Aristotelian notion that law exists to make men good. He endorses instead the libertarian tenet that relegates law to the role of guardian of order, guarantor of social tranquility. Still, Smolla recognizes that the ideas of racial and sexual equality which are undermined by racist and misogynist speech are not only about a desire to sensitize the populace and elevate community values, they actually reflect federal law and public policies.²¹⁴ Smolla's taxonomy of speech would include the following categories: statements of fact, statements of opinion, statements of transaction, statements of incitement, statements of emotion, and statements

²¹² See Bowman, *Street Harassment*, *supra* note 7, at 541 (citing Elizabeth Kissling & Cherie Kramarae, *Stranger Compliments: The Interpretation of Street Remarks*, 14 WOMEN'S STUDIES IN COMMUNICATION 75 (1991)), indicating that it is indeed political speech). See also *American Booksellers, Inc. v. Hudnut*, 771 F.2d 323, 328-29 (7th Cir. 1985) (discussing the Indianapolis anti-porn ordinance, the court wrote "[W]e accept the premises of this legislation. Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets. In the language of the legislature, '[p]ornography is central in creating and maintaining sex as a basis of discrimination.'")

²¹³ Smolla, *Rethinking Sexist Speech*, *supra* note 29.

²¹⁴ *Id.* at 174.

of art and entertainment.²¹⁵ Recognizing that these distinctions are not rigid and that many communications have elements of several of them, Smolla still finds this matrix useful for purposes of identifying speech that is devoid of ideological content such as that the First Amendment is intended to protect.

Statements with substantial factual content are rightfully accorded greater weight because factual assertions are more capable of objective verification; accordingly, the marketplace of ideas principle should effectively discern truth from amongst competing statements. By the same token, great deference has historically been accorded to statements of opinion; as stated in a landmark case in 1974, "there is no such thing as a false idea."²¹⁶ Again, the courts have assumed that incorrect opinions will be debunked through their competition with other ideas.²¹⁷ In addition to some overlap with the incitement element, opinions frequently include significant emotive elements. Purely emotive speech, however, includes no cognitive element, and it is this category which Smolla sees as most closely reflecting hate. This type of language, Smolla

²¹⁵ *Id.* at 179. Smolla's analysis of statements of transaction is particularly interesting. In these instances, regulating the language is really regulating the transaction, as with the law on negotiable instruments. Such laws may consider and restrict the language used on the instrument, but we do not consider this to have speech implications. It is merely the regulation of negotiable instruments. Similarly, sexual harassment in the workplace may be effected by pure speech, but what we really wish to regulate is the underlying non-speech conduct, which oppresses and injures women. The penalty or restriction on speech seems incidental to the purpose of eliminating the expression of misogyny in a transactional relationship? See *id.* at 186-87.

²¹⁶ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

²¹⁷ The Supreme Court has also recognized that "every idea is an incitement." Apparently, however, the rule of *Brandenburg* is intended to help us distinguish opinion from incitement, as the latter induces imminent lawlessness. It is a matter of degree.

asserts, requires no more cognitive activity than the "static level needed to use language . . . [it] states no fact, offers no opinion, proposes no transaction, attempts no persuasion; language that contains no humorous punchline, no melodic rhythm, no color or shape or texture that might pass as art or entertainment."²¹⁸ Such speech, devoid of any intellectual sub-text, communicates pure hate and insult. Smolla concludes that emotional speech standing "naked and alone", unclothed in cognitive content, does not invoke First Amendment protection because the requisite "free trade in ideas" is lacking.²¹⁹

If we agree with Smolla's argument, backed as it is by some First Amendment precedent distinguishing between appeal to reason and intellect versus appeal to passion and prejudice,²²⁰ misogynist speech that is purely emotional would be entitled to little or no weight in our *ad hoc* balancing process. (Interestingly, emotion is the part of the reason-emotion dichotomy that is typically associated with women. If a woman's emotional statement is of little or no value, why should an emotional statement about women be entitled to such protection?) The greater the intellectual or political idea component in a given misogynist communication, the greater its value or weight in the *ad hoc* balancing. This trade-off is based on the assumption that speech with a true intellectual or political component can be countered, or at least responded to, by more speech.

²¹⁸ *Id.* at 183; cf. Fentonmiller, *Verbal Harassment as Equality Depriving Conduct*, *supra* note 6, at 575, 577, 587 (noting the power of misogynist invective to evoke "an entire history of subjugation, as well as the present day realities of rape, incest, and domestic violence", thus stating their "meaning"; noting that much harassing speech is not capable of truth or falsity and thus implicitly conceding that it is pure emotion).

²¹⁹ *Id.* at 186.

²²⁰ *Id.* at 184 (citing *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring); *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973); *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287, 293 (1973)).

Pure hate, on the other hand, cannot. Not surprisingly, it appears that the greater the value we would accord any given speech in this balance, the lesser its harm would be, allowing the speech principle to trump where appropriate.

VII. CONCLUSION

Various gendered observations and feminist criticisms of specific laws addressing extremist or hate speech have been offered throughout this chapter. My discussion of hate speech's negative implications for equality of the sexes is related to the critique of rights that has been articulated in various contexts, including hate speech. As discussed in Chapter 2, which more fully expanded on various philosophies within the feminist jurisprudence movement, some have observed that feminism (or at least its cultural/relational strand) has adopted a critique closely akin to that known as the critique of possessive individualism or the critique of rights.²²¹ It is perhaps this cultural feminism that states the broadest critique of the absence of legal redress for extremist or hate speech. As with those who have approached the hate speech issue from a "communitarian" perspective,²²² some feminist scholars assert that their relational-based critique would identify similar flaws in a system that values of an individual speaker -- even one communicating ideologically vapid words or little more than undiluted hate -- over the wider societal interest in equality, particularly in the interests of women as a group to flourish and enjoy a healthy sense of themselves and their womanhood.

Less likely to invoke individual rights, women seem to have viewed themselves as part of a larger collective, as

²²¹ See *supra* Chapter 2, at Sects. IV and V. For more general reading on the critique of rights, see *THE POLITICS OF LAW* (D. Kairys ed. 1989).

²²² See, e.g., Note, *A Communitarian Defense of Group Libel Laws*, 101 *HARV. L. REV.* 682 (1988); D. DOWNS, *NAZIS IN SKOKIE: FREEDOM, COMMUNITY AND THE FIRST AMENDMENT* (1985).

part of a community; much of a woman's individual identity is wrapped up in her femaleness. An individual's standing in a community is dependent upon the standing of the groups to which he or she belongs, and unredressed harms to the group can undermine the individual's standing. "Tolerating vilification of such groups [] fails to respect the personhood of the vilified citizens; and in failing to respect equally the personhood of all members of the political community, toleration erodes the conception of the good that animates American political life."²²³

This communitarian perspective, which is consistent with cultural feminism, helps explain why it may be necessary -- if women really are to be valued as highly as men in our culture -- to provide a redress for psychic and communicative injuries that demean women as women. As for a legal method that would help achieve that goal, it seems that a contextualized analysis, perhaps through use of an *ad hoc* balancing method, would further feminist goals to a much greater degree than does the current complex matrix of speech classification under First Amendment precedent.

The absence of authentic and meaningful equality in our society actually exacerbates the harm caused by hate speech and makes it more devastating in the long run. Women do not currently enjoy equal status with men in either Britain or the U.S. Their inequality is multi-dimensional, with current statistics illustrating both women's economic marginalisation²²⁴ and the prevalence of

²²³ Note, *A Communitarian Defense of Group Libel Laws*, 101 HARV. L. REV. 682, 699 (1988).

²²⁴ See generally MARILYN WARING, *IF WOMEN COUNTED* (1989); Deborah Rhode, *The "No Problem" Problem: Feminist Challenges and Cultural Change*, 100 YALE L. REV. 1731 (1991). Women's economic and political marginalisation is indisputable. To cite only two statistics supporting this assertion: Sixty percent of those living below the poverty line in the United States are women, and women working full time earn only \$.66 to the man's dollar. Claudia Wallis, *Onward Women!*, *Time*, 4 December 1989, at 85.

sexual violence against them.²²⁵ Many of the arguments that women have advanced and that courts have acknowledged (while still not acting) regarding pornography's contribution to women's social and economic powerlessness and plight²²⁶ holds true with regard to sexually hateful speech. Re-enforcement of a "macho ideology", sexual abuse in various manifestations, harm to reputation and loss of credibility are among the harms that have been attributed to pornography.²²⁷ They are just as credibly attributed to extremist speech. Like pornography, other forms of misogynist communication frequently defines women according to their sexuality. It de-humanizes them by labelling or signifying them according to their body parts, e.g., "cunt" or "pussy", just as pornography pictorially portrays them as these body parts. Such hate speech often designates them according to their sexual availability -- or at least what the speaker speculates or desires their availability to be. They are "whores", "bitches", "sluts", "slags". Such misogynist speech necessarily demeans women as women. It lessens their credibility in all contexts, undermines

²²⁵ See, e.g., MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 97, at 169 (recent studies indicate that 44% of women will be the victims of rape or attempted rape in their lifetimes); see also Bowman, *Street Harassment*, *supra* note 7, at n 44 (citing studies with figures ranging from 11% to 44% in terms of the percentage of women who have been or will be the victims of rape or sexual assault in their lifetimes).

²²⁶ In *American Booksellers, Inc. v. Hudnut*, Judge Easterbrook acknowledged and affirmed the feminist position that "[d]epictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets." Still, he concluded that this "simply demonstrates the power of pornography as speech." 771 F.2d 329 (7th Cir. 1985); but see Paul Chevigny, *Pornography and Cognition: A Reply to Cass Sunstein*, 1989 DUKE L. J. 420, 428-31 (arguing that such speech only brings to the surface latent biases; it does not instill them).

²²⁷ See, e.g., JOEL FEINBERG, *OFFENSE TO OTHERS*, 150-51 (1985).

their social power and position, and defeats sexual egalitarianism.

Feminist critique of the recognition of this sort of injury reminds us that, under a "standpoint epistemology" analysis,²²⁸ any solution should be tailored according to the social factors prevailing at the given time, in the given community. One type of solution (legal or otherwise) is not optimum for all time because as members of a disadvantaged group -- in this case women -- become empowered over time through social change; the equality guaranteed them by the constitution becomes more meaningful, more real. Accordingly, they become less vulnerable, collectively and individually, to being undermined by hateful communications. Additionally, as women or any other group gain power, members of the group are more likely to confront racist and/or sexist comments; they are more likely to attempt to empower themselves through discourse. This is not to say that they will be able to attain the empathy of their harassers or that they will necessarily be perceived as anything other than nags. Still, it is heartening to contemplate the possibility that members of a disadvantaged group might gain sufficient strength to overcome the initial debilitating, even paralyzing, effect of hate speech in order rationally to defend themselves from verbal attack. Furthermore, if the victims of such offensive speech are able to educate the hateful speakers about the victim's point of view, another goal of feminist jurisprudence is achieved: exploration of viewpoints and experiences of the powerless (or at least the less power-

²²⁸ See *supra* chapter 1, § VI (discussing Kathleen Lahey, . . . *Until Women Themselves Have Told All They have to Tell* . . . , 23 OSGOODE HALL L.J. 519 (1985); Joan C. Williams, *Deconstructing Gender*, 87 MICH. L.REV. 797 (1989); Katharine Bartlett, *Feminist legal Methods*, 103 HARV. L. REV. 829 (1990)).

ful).²²⁹ With such exploration comes the acknowledgement of the law's perspective -- the perspective of the powerful who have shaped social institutions -- and an awareness of the need to be more inclusive of the perspectives of those outside the establishment.

²²⁹ See, e.g., generally MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW, ch. 7 (1990).

A Gendered Analysis of Defamation Law

I. INTRODUCTION

Defamation is a cause of action traditionally aimed at protecting an individual's reputation.¹ Including the twin torts of libel and slander, it may be alleged in either (or both) civil or criminal suits, depending upon the jurisdiction.² Parts of the law of defamation are much the same in both English and U.S. law; indeed the latter clearly traces its roots to the former.³ Important distinctions between the two have developed, however, in the past several decades, mostly due to the superimposition of constitutional doctrines upon the laws of the various American states,

¹ Although the law has long been perceived as concerned solely with reputational injury, indicia in many cases and the work of many commentators indicate that an element of psychic or emotional injury has crept in through the years. See generally RODNEY SMOLLA, *SUING THE PRESS*, 18-25 (1986) [hereinafter SMOLLA, *SUING THE PRESS*] and sources cited *infra* at Sect.VII.

² Throughout this chapter, I will use "defamation" to refer to both libel and slander unless some distinction between the two is relevant to the matter discussed. Furthermore, all my references are to civil law principles rather than to those of the criminal law, the former being far more prevalent and the latter virtually extinct, at least in the United States. See generally RODNEY SMOLLA, *LAW OF DEFAMATION* § 1.04 (1986 & Supp.) [hereinafter SMOLLA, *DEFAMATION*]; JOHN WATKINS, *THE MASS MEDIA AND THE LAW* 61 (1990) (noting that several U.S. states have declared criminal libel laws unconstitutional) [hereinafter WATKINS, *THE MASS MEDIA AND THE LAW*]; TOM CRONE, *LAW AND THE MEDIA*, ch. 4 (1989) [hereinafter CRONE, *LAW AND THE MEDIA*]; PETER CARTER-RUCK AND RICHARD WALKER, *CARTER-RUCK ON LIBEL AND SLANDER*, ch. 7 (1985) [CARTER-RUCK ON LIBEL]; GATLEY ON LIBEL AND SLANDER §§ 13, 1591-94 (8th ed. 1982) [hereinafter GATLEY].

³ For an excellent article comparing U.S. and British law and focusing on their social foundations, see Frederick Schauer, *Social Foundations of the Law of Defamation: A Comparative Analysis*, 1 *Jo. MEDIA L. & PRAC.* 18 (1980).

beginning with the case of *New York Times Co. v. Sullivan*⁴ in 1964 and continuing through quite recent pronouncements.

Perhaps more than any other tort, common law defamation features an enormously complex set of rules regarding various aspects of the tort--from defamatory meaning to privileges to damages. The great guru of American tort law, Dean William Prosser, criticized its minute, arcane distinctions, once saying that "a great deal of the law of defamation . . . makes no sense."⁵ In the United States, the confusion attendant these rules has been further exacerbated by the equally complex constitutional overlay alluded to above.

Although interest in protecting one's reputation has long been recognized as a legitimate concern of the law,⁶ the tort of defamation has been an object of legal criticism almost since its inception.⁷ Much of this criticism has stemmed from the law's uncertainty regarding damages awards, including doubts about whether monetary figures can or should be assigned to intangibles like reputation.⁸ Many have objected to defamation law's marginal rationality and lack of predictability, qualities generally demanded of

⁴ 376 U.S. 254 (1964).

⁵ WILLIAM PROSSER & WILLIAM KEETON, *PROSSER AND KEETON ON TORTS* § 111, at 771-72 (5th ed. 1984).

⁶ See ERIC BARENDT, *FREEDOM OF SPEECH*, 173 n. 1 (1985) [hereinafter BARENDT, *FREEDOM OF SPEECH*] (citing 1 BLACKSTONE COMMENTARIES 129); FRANKLYN S. HAIMAN, *SPEECH AND LAW IN A FREE SOCIETY* 43-44 (1981) [hereinafter HAIMAN, *SPEECH AND LAW*]; MARC FRANKLIN, *MASS MEDIA AND THE LAW* 109-10 (2d ed. 1982).

⁷ See generally FRANKLIN, *supra*, at 109-10; THE PRESS COUNCIL, *REFORMING THE LAW OF DEFAMATION* ¶¶ 7-10 (1973) (quoting *Boston v. W.S. Bagshaw & Sons Ltd.* 1 W.L. R. 1126 (1966); *Slim v. Daily Telegraph*, 2 Q.B. 157 (1968)) [hereinafter *REFORMING DEFAMATION*]. For a discussion of recent campaigns to reform various aspects of defamation law, see generally SMOLLA, *SUING THE PRESS*, *supra* note 1, at ch. 11.

⁸ See, e.g., David Anderson, *Reputation, Compensation and Proof*, 25 WM. & MARY L. REV. 747, 748-51 (1984) (citing, among others, McCormick, 12 N.C.L.REV. 120, 127 (1934)).

our law and legal institutions.⁹ In the latter part of the twentieth century, multi-million dollar awards in the U.S.¹⁰ and comparably large awards in England¹¹ have inspired much debate about libel reform in both countries.¹² The 1995 European Court of Human Rights decision in *Tolstoy Miloslavsky v. United Kingdom*,¹³ held that a £1.5 million award in a defamation case infringed the defendant's freedom of speech under article 10 of the European Convention because as English law then stood, the court was

⁹ See generally, e.g., E. KAMENKA AND A.E.-S. TAY, *The Traditions of Justice*, 5 LAW & PHILOSOPHY 281 (1986).

¹⁰ The current average award in a defamation suit against the media exceeds \$1 million. WATKINS, *THE MASS MEDIA AND THE LAW*, *supra* note 2, at 51. In *Tavoulareas v. Piro*, 817 F.2d 762 (D.C.Cir), *cert. denied*, 484 U.S. 870 (1987). Mr. Tavoulareas, president of Mobil Oil was awarded \$2.2 million in his suit against the *Washington Post*. The award was overturned by the trial judge, however. A former Miss Wyoming was awarded \$26.5 million in her 1982 suit against *Penthouse* magazine. However, that judgment was also reversed on appeal. *Pring v. Penthouse International, Ltd.* 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983). In 1987, the Seventh Circuit affirmed a \$3.05 million award arising from a broadcast report that a tobacco company had undertaken an advertising campaign to entice young people to smoke. *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119 (7th Cir. 1987) *cert. denied*, 485 U.S. 993 (1988).

¹¹ See generally REFORMING DEFAMATION, *supra* note 7, at paras. 61-62. Recent notable awards in Britain include Jeffrey Archer's, in the amount of £500,000 against the *Star*, after the newspaper reported that he had paid a prostitute £2000 to stop her talking about their relationship. ADAM RAPHAEL, *MY LEARNED FRIENDS* (1989). Although Sonia Sutcliffe was initially awarded a record £600,000 in her suit against *Private Eye*, that award was reduced on appeal to £60,000. *Sutcliffe v. Pressdram Ltd.*, reported in *Law Report, The Times (London)*, October 20, 1989.

¹² See generally SMOLLA, *SUING THE PRESS*, *supra* note 1; REFORMING DEFAMATION, *supra* note 7; Rodney A. Smolla & Michael Gaertner, *The Annenberg Libel Reform Proposal: The Case for Enactment*, 31 WM. & MARY L. REV 25 (1989). See also Defamation Act 1996, Sect. 2 (Offer to make amends).

¹³ Case No. 8/1994/455/536, *The Times*, 19 July 1995, E.C.H.R.

without adequate power to control disproportionate damages awards. Since then, the Court of Appeal has ruled that libel juries should be given guidance in performing their role in assessing damages, including reference to appropriate awards.¹⁴

While English defamation law's continuing embrace of strict liability, a rarity in tort, continues to be a concern,¹⁵ the trend appears to be toward a recognition that defamation law may inhibit open debate on matters of public concern. The 1993 decision in *Derbyshire County Council v. Times Newspapers Ltd.*,¹⁶ citing the germinal U.S. Supreme Court decision in *New York Times v. Sullivan*, held that, given the public interest in uninhibited criticism of government bodies, a local authority could not maintain an action for defamation. In addition, the Defamation Act of 1996 expands privileges and provides for "Offers to make amends" whereby corrections and/or apologies may be made regarding offending publications, thereby avoiding litigation.

Meanwhile, in the United States the Supreme Court continues to struggle with the proper balance to be struck

¹⁴ See *John v. MGN Ltd., The Times*, 14 December 1995, C.A.; see also *Rantzen v. Mirror Group Newspapers, The Times*, 6 April 1993, C.A. (reduced award from £250,000 to £110,000; grant of almost limitless discretion to defamation jury failed to provide satisfactory measurement for deciding what was necessary in democratic society or justified by a pressing social need, and the courts should subject large awards to more searching scrutiny regarding amount really necessary to compensate plaintiff for damage to reputation).

¹⁵ BARENDT, FREEDOM OF SPEECH, *supra* note 6, at 178; REFORMING DEFAMATION, *supra* note 7, at ¶¶ 18-19.

¹⁶ [1993] 1 All E.R. Rep. 1011; [1993] AC 534, discussed in Eric Barendt, *Libel and Freedom of Speech in English Law*, 1993 PUBLIC LAW 449. A few years later, the High Court clarified that English law does not recognize as a defense to a libel action that the communication was in the public interest or that the plaintiff was a public figure. *Bennett v. Guardian Newspapers Ltd., The Times*, 28 Dec. 1995, Sir Michael Davies, sitting as a High Court Judge.

between reputational and free speech interests, shifting the balances based on public versus private concern, media versus non-media defendant, and public versus private plaintiff distinctions.¹⁷

While more detail regarding various rules of defamation law will be provided later in this chapter, in the process of establishing my thesis that this area of the law reflects a gendered character, some initial observations about its purpose and social function are appropriate here.

II. THE PUBLIC-PRIVATE DICHOTOMY AND DEFAMATION LAW

The first general observation relates to the much discussed public-private dichotomy in law, about which an overview is appropriate here. The public-private dichotomy (also referred to varyingly as the market-family¹⁸ or civil-natural¹⁹ dichotomy) has been used by feminist legal scholars to help explain to some extent law's disparate treatment of and impact upon the lives of women.²⁰ More pervasive and long standing than this feminist project has been the perception that public and private spheres of

¹⁷ See generally Rodney Smolla, *Dun & Bradstreet, Hepps, and Liberty Lobby: A New Analytic Primer on the Future Course of Defamation*, 75 GEORGETOWN L.J. 1519 (1987) [hereinafter Smolla, *New Analytic Primer*].

¹⁸ See, e.g., Nancy Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L.L.REV. 79 (1989) [hereinafter Dowd, *Work and Family*]; Fran Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983) [hereinafter Olsen, *Family and Market*].

¹⁹ See CAROLE PATEMAN, *THE SEXUAL CONTRACT*, 11 (1988) [hereinafter PATEMAN, *SEXUAL CONTRACT*].

²⁰ See generally NGAIRE NAFFINE, *LAW AND THE SEXES* (1990); KATHERINE O'DONOVAN, *SEXUAL DIVISIONS IN LAW* (1985); HESTER EISENSTEIN, *CONTEMPORARY FEMINIST THOUGHT*, ch. 2. (1984); Frances Olsen, *The Sex of Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 453-65 (2d ed. 1989, David Kairys, ed.); Dowd, *Work and Family*, *supra* note 18; Olsen, *Market and Family*, *supra* note 18; see also *supra* Ch. 2, at Sect. VI.

society are distinct, an idea that "is imbued in legal philosophy and informs legal policy."²¹

In discussing this public-private dichotomy, I do not refer strictly to the distinction between individual-state relations (i.e., the criminal law, civil liberties) and individual-individual relations (i.e., contracts, divorce, tort, commercial transactions) sometimes inferred from social contract theory generally. Rather, my focus is upon the division between what the law considers its business (regulated) and what it does not (unregulated). That is to say, any area in or upon which the law operates (some would say "interferes") is or becomes "public" to some degree. In this sense the public defines the private as that remnant of society with which it declines to deal. The line is one between the regulated and the unregulated, and often also one between grievances for which the law provides redress and those for which it does not.²² As noted in Chapter 2, this dichotomy often corresponds to the market-family and reason-nature dichotomies that we also see reflected in law.

It is important to realize that there are notable consistencies among these various public categories from different contexts, as well as among these various private categories, and that the public and private are very rarely completely mutually exclusive sectors. Finally, none of the categories is static; rather, all have proved fluid and responsive to social and cultural shifts.

²¹ O'DONOVAN, *SEXUAL DIVISIONS IN LAW*, *supra*, at 8.

²² See generally O'DONOVAN, *SEXUAL DIVISIONS IN LAW*, *supra* note 20, at 8-9; Nicola Lacey, *Theory into Practice? Pornography and the Public/Private Dichotomy*, 20 *JOUR. OF LAW & Soc.* 93, 103 (1993) [hereinafter, Lacey, *Theory into Practice?*] (endorsing Iris Marion Young's explication of the public-private dichotomy: ". . . the private should be defined . . . as that aspect of his or her life and activity that any person has a right to exclude others from. The private in this sense is . . . what the individual chooses to withdraw from public view.") (quoting IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE*, 119-20 (1990)).

The public-private dualism arises in legal contexts other than those already mentioned, and its connotations vary. One of these contexts relates to the free speech doctrine which distinguishes between public discourse and private discourse.²³ Another related context is the tort of privacy, with its over-arching concern to protect from public disclosure or exploitation that which invades the individual's personality or psychic space.²⁴

While one might initially assume that because defamation seeks to restore to the defamed individual something immensely personal²⁵ and intangible -- reputation -- it is

²³ As Professor Robert Post has noted, the concept of the "public" has a number of different meanings relevant to First Amendment doctrine. Robert Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 626 (1990). The Supreme Court has emphasized that "the First Amendment 'embraces at least the liberty to discuss publicly . . . all matters of public concern.'" *Id.* (citing *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 534 (1980) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940))). Furthermore, "expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" *Id.* (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980))).

²⁴ See generally RICHARD HIXSON, *PRIVACY IN A PUBLIC SOCIETY*, ch. 2 (1987). Interestingly, the two public-private contexts noted here were considered compatible by the initial proponents of privacy law. Samuel Warren and Louis Brandeis in their germinal 1890 article wrote that the right of privacy did not prohibit publication of matters of "public interest", as the latter concept was central to First Amendment philosophy. *Id.* at 34 (discussing the Warren-Brandeis article).

²⁵ Several sources even refer to defamation as a "personal" tort. However, such labelling generally means that the cause of action rests with an individual and that only he or she can bring suit for recovery. It also means that if the defamed individual dies, the suit dies with him or her. See generally WATKINS, *MASS MEDIA AND LAW*, *supra* note 2, at 58; GATLEY, *supra* note 2, at ¶ 921.

On the other hand, the tort is not "personal" in the sense that only natural persons may be plaintiffs. Indeed, an incorporated body may sue if the defamation complained of impairs its business reputation. See CARTER-RUCK ON LIBEL, *supra* note 2, at 65-74; CRONE, *LAW AND THE MEDIA*, *supra* note 2,

a rare example of the law redressing a wrong within the private sphere (or the law making "public" what we might intuitively think of as private), this is not the case. Defamation law's purpose is, after all, to protect reputation--the standing of an individual in the community, among his or her peers, in the public realm of society, in the marketplace.²⁶ The "public" is the market, which people enter for economic reasons, with the primary motivation of profit making.²⁷ In that market, decisions tend to be made based not on individuals' divergent experiences and backgrounds, but rather upon commonly available "fact and news."²⁸ This is the realm of public discourse, where those acting in the public sector contemplate not only individual success and community standing, but also the common ground of democratic self-governance and their shared political destiny.

Thus, the tort of defamation has never been about the "private" at all.²⁹ To state it another way, defamation has generally not been regarded as a remedy for the thin-skinned, to protect them from a nebulous sort of psychic injury. It protects the defamed's reputation, and therefore his stature within the public sphere, the competitive marketplace. Defamation law treats an individual's reputa-

at 16; BRIAN NEILL & RICHARD RAMPTON, *DUNCAN AND NEILL ON DEFAMATION* 42-48 (2d ed. 1983) [hereinafter NEILL, DEFAMATION]; WATKINS, *MASS MEDIA AND LAW*, *supra* note 2, at 58; GATLEY, *supra* note 2, at ch. 21.

²⁶ *But see* ERIC BARENDT, *FREEDOM OF SPEECH* 173 (1985) (noting Western societies' attachment of great importance to an "individual's reputation and his self-esteem", implying that defamation law may be concerned with psychic injuries as well as reputational ones).

²⁷ *See, e.g.,* Carroll Clark, *The Concept of the Public*, 13 SW. Soc. Sci. Q. 311 (1933).

²⁸ *Id.* at 316.

²⁹ *But see infra* notes 157-63 and accompanying text (noting that defamation damages law has sometimes accepted inclusion of amounts for emotional harm).

tion much like any portion of his or her tangible property in that it seeks to protect the property from injury by others. Like the law of trespass, for example, which also represents public regulation of interaction between individuals, it provides a remedy when another causes damage to the "chattel" that is his community (marketplace) standing--his reputation.³⁰ Without restoration of good reputation, a man's assumed and valued ability to function on a level playing field with others in the public sphere would be damaged.

What, then, of the part of women in this socio-legal scheme? It is easy enough to observe that women, who now operate in the public (market) sphere in greater numbers than ever before, have a greater need for access to this redress of reputational injury. But women have historically functioned almost exclusively in society's private (domestic) realm where their reputational concerns have been different, reflecting the primacy of the private sphere in their lives. It has reflected their association with the natural, the sexual, indicating that woman's sexual purity is her most important attribute. Women's forays into the public sphere have generally been as secondary players, in clerical jobs, for example, rather than as policy makers.

Women's association with the private (domestic) sphere is, admittedly, increasingly tenuous -- as is the assumption that the private (domestic) sphere is unregulated.³¹ More and more women operate in the "market," and the law increasingly regulates what might be considered "private" or domestic, e.g., family, adoption. Nevertheless, the sexual and social contract concepts--as well as the private

³⁰ See Post, *Public Discourse*, *supra* note 24, at 616-18; Robert Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 77 CALIF. L. REV. 691, 707-19 (1986).

³¹ See, e.g., Lacey, *Theory into Practice?*, *supra* note 22.

and public spheres--continue to be prevalent enough to remain useful analytical concepts. And, as is revealed below, women's continued operation in the private sphere is often reflected in the types of reputational injuries for which they seek redress in the law of defamation.

III. WOMEN AS DEFAMATION PLAINTIFFS

The public purpose or nature of defamation law may be observed in a number of the law's various peculiarities, as discussed in the following sections. The gender bias of the law is also evident in any brief perusal of the defamation cases being covered in the newspapers, included in the average case book or reproduced in the current law reports. While defamation suits, historically speaking, were rarely brought by women, as women have increasingly moved into the public (market) sphere they have more often brought defamation suits to redress the same types of libels for which men also seek relief and compensation: publications calling into question their business or professional competence,³² statements alleging criminality,³³ and attacks impugning morality generally, such as allegations of extreme rudeness or alcoholism.³⁴ Additionally, women are still bringing, though perhaps less frequently, the type of

³² See, e.g., *Richmond Newspapers, Inc. v. Lipscomb*, 234 Va. 277, 362 S.E.2d 32 (1987), cert. denied, 486 U.S. 1023 (1988) (regarding local teacher's competence); *Farris v. Tvedten*, 274 Ark. 185, 623 S.W.2d 205 (1981) (publications implied that nurse had substituted a plaintiff's medication).

³³ See, e.g., *Bland v. Verser*, 299 Ark. 490, 774 S.W.2d 124 (1989) (bank teller sued over allegations she converted funds); *Farris v. Tvedten*, 274 Ark. 185, 623 S.W.2d 205 (1981).

³⁴ See, e.g., *Burnett v. National Enquirer, Inc.*, 144 Cal. App.3d 991, 193 Cal. Rptr. 206 (1983), appeal dismissed, 465 U.S. 1014 (1984) (where Ms. Burnett sued over a story indicating that she argued publicly with Henry Kissinger while drinking heavily); *Calder v. Jones*, 465 U.S. 783 (1984) (defamatory statement again about heavy drinking).

defamation suits that may have been originally anticipated by the law³⁵: those based on attacks regarding their chastity or sexual morality.³⁶ A relatively recent U.S. text³⁷ provides a typical sampling of female defamation plaintiffs and the defamatory statements that provoked their suits. In the defamation chapter, the author mentions the following female plaintiffs: entertainers Carol Burnett, Elizabeth Taylor, and Shirley Jones³⁸; a Miss America contestant who reportedly performed fellatio on her coach³⁹; a public secondary school teacher whose competence was questioned⁴⁰; two alleged adulteresses⁴¹; and three women stage performers, the Cherry Sisters, who were described by an entertainment critic as "strange creatures with painted faces" whose voices were "like the wailing of

³⁵ See *infra* Sect. IV (B) (discussing the original four slander *per se* categories).

³⁶ See, e.g., *Time, Inc. v. Firestone*, 424 U.S. 448 (1976) (adultery); *Pring v. Penthouse Int'l Ltd.*, 695 F.2d 438 (10th Cir. 1982) (sexual promiscuity), *cert. denied*, 462 U.S. 1132 (1983); *Mitchell v. Globe Intern. Pub. Co.*, 773 F.Supp. 1235 (W.D.Ark. 1991) (elderly plaintiff reportedly pregnant); *Smith v. Atkins*, 622 So.2d 795 (La.App. 4 Cir. 1993) (female law student called a "slut" by her professor); *Thiel v. Dove*, 229 Ark. 601, 317 S.W.2d 121 (1958) (defamatory statement implied adultery on part of married female plaintiff); *Miller v. Nuckolls*, 77 Ark. 64, 91 S.W. 759 (1905) (unmarried plaintiff had reportedly given birth to a child and secretly buried it).

³⁷ WATKINS, MASS MEDIA AND LAW, *supra* note 2.

³⁸ See generally SMOLLA, *SUING THE PRESS*, *supra* note 1.

³⁹ *Pring v. Penthouse Int'l, Ltd.* 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983).

⁴⁰ *Richmond Newspapers, Inc. v. Lipscomb*, 234 Va. 277, 362 S.E.2d 32 (1987), *cert. denied*, 486 U.S. 1023 (1988).

⁴¹ *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Memphis Publishing Co. v. Nichols*, 569 S.W.2d 412 (Tenn. 1978).

damned souls."⁴² This is probably a fairly representative cross-section of female plaintiffs, and the portrayal, with the arguable exception of the celebrities, is not of a particularly illustrious collection.

Whether such inventories really reveal anything sexist or insidiously gendered about the law of defamation is debatable. They may merely reflect the type of roles society has allocated to women. After all, women, traditionally and still predominantly operating in the private sector, are under-represented as parties in most categories of cases outside domestic relations law -- from contract to property to securities fraud. Further observations about the law of defamation and its operation (or lack thereof) in women's lives are necessary before conclusions reasonably can be drawn. It is more telling of judicial attitudes toward female plaintiffs, for example, to look not only at the various ways in which women are defamed, but also to focus upon the ways that courts have construed and handled such defamatory remarks. Some of the bias-revealing cases are discussed below in the context of various defamation laws.

IV. THE GENDERED CHARACTER OF THE COMMON LAW RULES

A. Defamatory Meaning

One of the elements of a plaintiff's *prima facie* case for libel or slander is that the offensive statement be defamatory, but what exactly does "defamatory" mean? Various definitions have been set forth by statute and in case law. The American Restatement (Second) of Torts provides that "a communication is defamatory if it tends so to harm the reputation of another as to lower him in the

⁴² *Cherry v. Des Moines Leader*, 86 N.W. 323 (Iowa 1901). Additionally, the author notes that persons deemed public figures for purposes of *New York Times* actual malice, have included "actresses . . . nude dancers, belly dancers . . . a *Playboy* 'Playmate of the Month,' and the former 'number one girlfriend' of Elvis Presley." WATKINS, *MASS MEDIA AND LAW*, *supra* note 2, at 73.

esteem of the community or to deter third persons from association or dealing with him."⁴³ Early English case law usually spoke in terms of language that exposed an individual to "hatred, contempt, or ridicule."⁴⁴ In the 1924 case of *Tournier v. National Provincial and Union Bank of England*,⁴⁵ two Lords Justices of Appeals recognized in separate opinions that such a definition was inadequate in some cases, particularly those where words might damage the "reputation of a man as business man, which no one would connect with hatred, contempt, or ridicule."⁴⁶ The English Faulks Committee in 1975 recommended the following definition: "Defamation shall consist of the publication to a third party of matter which in all the circumstances would be likely to affect a person adversely in the estimation of reasonable people generally."⁴⁷

One of the most comprehensive attempts at definition was stated in 1933 by a New York state court where the judge referred to

words which tend to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation, or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons, and to deprive one of their [sic] confidence and friendly intercourse in society.⁴⁸

⁴³ RESTATEMENT (SECOND) OF TORTS § 559 (1977).

⁴⁴ See, e.g., *Parmiter v. Coupland*, 6 M & W 105, 108 (1840).

⁴⁵ [1924] 1 KB 461.

⁴⁶ *Id.* at 477, 486 (opinions of Scrutton, LJ and Atkin, LJ).

⁴⁷ Report of the Faulks Committee, *infra* note 71, at ¶ 65.

⁴⁸ *Kimmerle v. New York Evening Journal, Inc.*, 262 N.Y. 99, 102, 186 N.E. 217, 218 (1933).

The determination whether a statement is defamatory is to be made in its social, temporal and community context. That means that the time and place of the statement's publication are relevant to the decision about its defamatory character.⁴⁹ A good illustration of this, particularly as it often regards women plaintiffs, is in the arena of sexual propriety: a statement that a man and woman are living together unmarried probably would not be deemed defamatory today, although it almost certainly would have been in the early part of this century. Similarly, the statement is much less likely to be judged defamatory by a London or New York City jury than it is by one in the U.S. "Bible Belt".

So what do juries make of such definitions of defamation when they are given the task of applying the standard to a given statement at issue in a particular case? Some interesting results are to be discovered when looking at several decisions involving women plaintiffs. For example, in *Youssof v. MGM Pictures Ltd.*,⁵⁰ Lord Justice Slesser recognized that a statement suggesting that a woman had been "seduced or ravished" constituted a libel, even though moral blame was not imputed to the woman.

[N]ot only is the matter defamatory if it brings the plaintiff into hatred, ridicule, or contempt by reason of some moral discredit on her part, but also if it tends to make the plaintiff be shunned and avoided and that without any moral discredit on her part. . . . One may, I think, take judicial notice of the fact that a lady of whom it has been said that she has been ravished, albeit against her will, has suffered in some social reputation and in opportunities of receiving respectable consideration from the world.⁵¹

⁴⁹ See generally CRONE, *LAW AND THE MEDIA*, *supra* note 2, at 8; WATKINS, *MASS MEDIA AND LAW*, *supra* note 2, at 54; SMOLLA, *DEFAMATION*, *supra* note 2, at §§ 4.02, 4.05.

⁵⁰ [1934] 50 TLR 581.

⁵¹ *Id.* at 587.

The Lord Justices rendering decisions in the case disagreed as to whether the allegedly defamatory film depicted the plaintiff⁵² being "ravished" (raped) or merely seduced.⁵³ Nevertheless, at least Lord Justice Slesser appeared to consider such a distinction irrelevant to the question of defamatory meaning, writing

[I]t is not necessary to ask the jury to entertain such speculation [about rape versus seduction] at all. When this woman is defamed in her sexual purity I do not think that the precise manner in which she has been despoiled of her innocence and virginity is a matter which a jury can properly be asked to consider.⁵⁴

Whereas most defamatory statements feature some element of the plaintiff's wrongdoing, moral or character failing, or ignorance, Lord Justice Slesser considered the question of the plaintiff's morality or fault "immaterial."⁵⁵

⁵² The plaintiff's identification was an additional issue addressed on appeal, but details of the courts handling of that matter are not relevant to the issue of defamatory meaning. *Id.* at 581-83.

⁵³ Lord Justice Slesser opined that the pictures and language of the film were consistent with either rape or seduction, and he was uncertain that the jury considered it rape rather than seduction. *Id.* at 587.

⁵⁴ *Id.* at 588. Lord Justice Slesser clarified, "When I say 'properly' I do not mean it would be wrong to ask them to consider it, but the absence of any such consideration cannot, in my view, disturb the jury's ultimate finding." *Id.*

⁵⁵ *Id.* at 587. The Lord Justice used the language "more or less moral" to describe the distinction between ravishment and seduction, the implication of which is unclear in terms of possibly declaring the former of no moral fault of hers but the latter of some degree of moral fault.

Lord Justice Greer, on the other hand, assumed that the jury considered that the film portrayed the plaintiff's seduction, thus falsely implying her moral weakness and explaining the substantial damages award. *Id.* at 586.

[A]s has been frequently pointed out in libel, not only is the matter defamatory if it brings the plaintiff into hatred, ridicule, or contempt by reason of some moral discredit on her part, but also if it tends to make the plaintiff be shunned and avoided and that *without any moral discredit* on her part.⁵⁶

Apparently in 1934 Britain, an unmarried woman's mere loss of virginity, whatever the circumstances, was defamatory. Lord Justice Scrutton's response to the issue was the strongest, as he vehemently denounced, even ridiculed, the suggestion that the objectionable statement might not be defamatory of the plaintiff.

I only wish the jury could have expressed, and that we could know, what they thought of [the argument that a raped woman does not suffer imputations of unchastity], because it seems to me to be one of the most legal arguments that were ever addressed to . . . a sensible body. . . I really have no language to express my opinion of that argument.⁵⁷

One wonders if women are to be pleased that they can recover under these circumstances -- in which a statement regarding loss of virginity or, worse yet, a rape, defames them. Are they to be outraged that such a finding implicitly places some blame with them just as most other false defamatory statements imply some failing or blame on their subjects?⁵⁸ Should we criticize courts that uphold such

⁵⁶ *Id.* at 587 (emphasis added).

⁵⁷ *Id.* at 584.

⁵⁸ Allegations of homosexuality are, for example, widely regarded as defamatory, see, e.g., Schomer v. Smidt, 113 Cal. App.3d 828, 170 Cal.Rptr. 662 (1980); Moricoli v. Schwartz, 46 Ill. App.3d 481, 361 N.E.2d 74 (1977); though not necessarily as slander per se. See, e.g., Hayes v. Smith, 832 P.2d 1022 (Colo. 1992); Boehm v. American Bankers Ins. Group, 557 So.2d 91 (Fla. Dist. Ct. App. 1990). This may be attributable to the great number of people who consider homosexuality to be a personal failing, not a neutral characteristic with which one is born. See

findings of defamatory meaning (or perhaps, more accurately, defamatory "effect") when, in reality, society is to blame for its unenlightened attitude about rape survivors? One cannot help wonder how long this perspective will endure.

Certainly, there is inconsistency in judicial opinions of the last 20 years regarding whether the labels "bitch" and "slut" are defamatory. Some courts have found these words to be name calling and epithets not actionable in defamation,⁵⁹ but others have analyzed whether they carry defamatory meaning, with the decision usually turning on the context in which spoken or written.

Consider the case of *Branda v. Sanford*,⁶⁰ in which comedian Redd Foxx was sued for allegedly calling a young woman a "fucking bitch", "fucking cunt", and "no lady." The woman had the encounter with Foxx as she performed her duties at a Las Vegas hotel, and she sued him for both defamation and intentional infliction of distress. The trial court determined that the words "cherry" and "bitch" did not imply unchastity and were therefore not slander per se.⁶¹ On appeal the Nevada Supreme Court agreed that the words were not, as a matter of law, slanderous per se, but held that a jury should have been allowed to determine whether the words were defamatory. The court noted other

Matherson v. Marchello, 100 A.D.2d 233, 473 N.Y.S.2d 998 (1984) ("Rightly or wrongly, individuals still view homosexuality as immoral"). The RESTATEMENT (SECOND) OF TORTS §§ 571-74 (1977), leaves the issue open.

⁵⁹ See *infra* notes 127-31 and accompanying text (discussing *Ward v. Zelikovsky*, 643 F.2d 972 (N.J. 1994) and *Lee v. Metropolitan Airport Commission*, 428 N.W.2d 815 (Minn. App. 1988)).

⁶⁰ 97 Nev. 643, 637 P.2d 1223 (1981).

⁶¹ See *infra* Sect. IV (B); see also *Halliday v. Cienkowski*, 333 Pa. 123, 3 A.2d 372 (1939) ("bitch" not actionable per se).

cases where "bitch", modified by "low-lived" or "whoring", had been held susceptible of a defamatory construction.⁶²

In another case, *Smith v. Atkins*,⁶³ a female law student sued her professor for defamation when he called her a "slut" during class one day. The majority of the court found that the label slut was "defamatory per se," but one dissenting opinion is illustrative of the conflict to which I have referred. That judge stated that he did not consider the word "slut" defamatory per se, although it was in the circumstances of that particular case. He indicated that, to determine whether words were defamatory, "the context and the circumstances surrounding the alleged defamatory statement" had to be considered. He justified his conclusion by noting the "especially egregious" facts of the case, including the fact that the defendant was a "law professor, entrusted with the legal education of both the plaintiff and many of her peers, all of whom undoubtedly regarded the defendant with some respect because of his position at the law school. Against that background, the defendant chose to engage in a personal attack on one of his students in crowded classroom setting."⁶⁴

B. *The Per Se Rules.*

The most obviously gendered aspect of defamation law is a feature of English law that is also followed in a number of U.S. jurisdictions.⁶⁵ Amidst a very complex

⁶² See *Craver v. Norton*, 114 Iowa 46, 86 N.W. 54 (1901); *Cameron v. Cameron*, 162 Mo. App. 110, 144 S.W. 171 (1912).

⁶³ 622 So.2d 795 (La.App. 4 Cir. 1993).

⁶⁴ *Id.* at 802-03.

⁶⁵ See, e.g., *Linebaugh v. Sheraton Michigan Corp.*, 497 N.W.2d 585 (Mich. Ct. App. 1993) (citing M.C.L.A. § 600.2911(1)); *King v. Tanner*, 142 Misc.2d 1004, 539 N.Y.S.2d 617 (1989); *Moreau v. Brennan*, 466 So.2d 572, 573-74 (La. 1985) (both wife and husband were defamed by allegations that wife has having extramarital sexual relations; allegations constituted "defamation per se");

series of rules regarding what was deemed libel *per se* and slander *per se*--and as a corollary to what types of damages were available on what types of proof--is a rule providing that if a woman's chastity is impugned by an oral or otherwise transitory statement, she is deemed to have suffered a *per se* slander and accordingly is not required to adduce evidence of actual pecuniary loss in order to recover.⁶⁶ Three other categories of defamatory statements, none of them similarly gender-specific, fall within this rule: (1) statements imputing commission of a crime punishable by imprisonment; (2) statements imputing that a person has a contagious or infectious disease; (3) statements disparaging a person in his trade, business or profession.⁶⁷ The double standard embodied in the rule making adulterous allegations about women -- but not men -- slander *per se* is not only startling, it is surely not justified by current social standards in most Western countries.

One way of looking at this rule is that it makes a public matter of what most would consider a private one.⁶⁸

Wardlaw v. Peck, 282 S.C. 199, 318 S.E. 2d 270 (1984) (citing South Carolina Code § 15-75-10 (1976); held that statute's application to women only does not violate equal protection clause of U.S. Constitution); Modla v. Parker, 17 Ariz. App. 54, 495 P.2d 494 (1972); Tonsmeire v. Tonsmeire, 281 Ala. 102, 199 So.2d 645 (1967). The trend seems to be toward eliminating the restriction of this type of slander *per se* to women plaintiffs. See RESTATEMENT (SECOND), *supra* note 43, at § 574.

⁶⁶ See generally SLANDER OF WOMEN ACT, § 1 (1891), discussed in PETER F. CARTER-RUCK AND RICHARD WALKER, CARTER-RUCK ON LIBEL AND SLANDER, 77 (3d ed. 1985) and GATLEY, *supra* note 2, at ¶ 186.

⁶⁷ *Id.*; CARTER-RUCK ON LIBEL, *supra* note 2, at 75; GATLEY, *supra* note 2, at ¶¶ 149, 166, 168.

⁶⁸ The public import which this rule assigns a woman's sexual morality appears to contradict the general rule that law recognizes a zone of privacy in which each individual controls private information and knowledge about him or herself. See generally HIXSON, PUBLIC SOCIETY, *supra* note 24, at ch 2; O'DONOVAN, SEXUAL DIVISIONS IN LAW, *supra* note 20, at

Just as the other slander per se categories regard activities in society's public realm, the inclusion of this fourth gender-specific rule implies that it, too, is a public matter. Perhaps this is because when the rule was enacted by Parliament in 1891 (and maybe still today), the cultural perception was that women's most important attribute was their upright morality. Indeed, it seems their chastity was symbolically important like none of their other qualities or characteristics. I believe that this is because, historically, men have considered themselves the guardians--even proprietors--of women's sexuality.⁶⁹ If a man's wife or daughter was maligned based on her sexual morality, the husband or father's reputation was injured and consequently his ability to prosper in the public sphere was, too.⁷⁰ It is entirely conceivable that society was more concerned to redress the wrong perceived done to the father or husband of a woman whose chastity was im-

70-71.

⁶⁹ See generally CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* chs. 9-10 (1989); ANDREA DWORKIN, *INTERCOURSE* 73-93 (1987); PATEMAN, *SEXUAL CONTRACT*, *supra* note 19, at 2 (citing Adrienne Rich, *Compulsory Heterosexuality and Lesbian Experience*, 5 *SIGNS* 645 (1980)); O'DONOVAN, *SEXUAL DIVISIONS*, *supra* note 20, at 6-7; NAFFINE, *LAW AND THE SEXES*, *supra* note 20, at 70-71. This was especially so in marriage, in which the wife was considered the husband's chattel; the two were considered one flesh. See O'DONOVAN, *SEXUAL DIVISIONS*, *supra* at 119-21.

The historical context in which the Slander of Women Act was passed was no doubt similar to that in which Warren & Brandeis proposed the adoption of a privacy tort in the United States in 1890. For further discussion of the historical context, see Anita L. Allen & Erin Mack, *How Privacy Got Its Gender*, 10 *N.ILL.U.L.REV.* 441 (1990) and Chapter 5.

⁷⁰ See, e.g., *Moreau v. Brennan*, 466 So.2d 572 (La. 1985) (both husband and wife were defamed by allegation that wife had extramarital sexual relations); see also *Lynch v. Knight*, [1861] IX H.L.C. 578; *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (father sued for invasion of privacy after newspaper included his daughter's name in news report of her rape and murder).

pugned and far less worried about consequences for the woman.

While these *per se* categories help reveal some of the initial assumptions of defamation law, in reality the *per se* categories are seldom at issue in case analysis because they operate only in a very small number of cases. In England, they apply only to slander cases, not to libel actions,⁷¹ the latter being more common. In the United States, only a few states still maintain a similar statutory rule.⁷² Nevertheless, charges of sexual impropriety more often lead to defamation suits by women than by men, even if the defamatory nature of the statement is decided by the jury on an *ad hoc* basis.⁷³

The practical effect of designating a statement slander *per se*, as noted previously, is that it eliminates the plaintiff's need to show actual pecuniary injury before the suit can go ahead.⁷⁴ That is, the plaintiff need not establish, as part of his or her *prima facie* case, that actual loss resulted from the offensive statement. In the context of a case where imputations of lack of skill in one's business constituted the defamation, for example, the plaintiff would not have to show that business activity or income actually decreased or was lost because the presumption is to this effect. One can readily observe, then, the significance of this rule to the case of a woman who had

⁷¹ Incidentally, the Faulks Committee in 1975 advocated that this distinction between libel and slander be abolished. See Report of Faulks Committee (Cmnd. 5909) Appendix VI (1975).

⁷² WATKINS, MASS MEDIA AND LAW, *supra* note 2, at 54.

⁷³ Compare *Smith v. Atkins*, 622 So.2d 795 (La. App. 4 Cir. 1993) ("slut" defamatory *per se*) with *Lee v. Metropolitan Airport Commission*, 428 N.W.2d 815 (Minn. App. 1988) ("bitch" not defamatory).

⁷⁴ See generally SMOLLA, DEFAMATION, *supra* note 2, at § 7.05; CRONE, LAW AND THE MEDIA, *supra* note 2, at 4; WATKINS, MASS MEDIA AND LAW, *supra* note 2, at 54; GATLEY, *supra* note 2, at ¶ 143.

allegedly engaged in sexual impropriety or whose chastity was otherwise impugned: she would not have to establish actual injury related to the slander. One wonders, however, what sort of evidence of actual pecuniary loss a woman in this circumstance could ever adduce if she had to. Unless, for example, it caused her to lose a job or a rich boyfriend or fiancé, what tangible injury might there be?

Perhaps, then, there are practical reasons for inclusion of this category of slander *per se* in the list of four. That is, if this type of statement were not slander *per se*, a suit might never proceed for lack of evidence of actual injury. This was probably not, however, the reason for the designation of these categories of statements as slander *per se* because the other three categories appear to lend themselves more easily to proof of actual pecuniary loss. Accordingly, these four categories were likely designated not because of a belief that these plaintiffs needed the evidentiary edge; rather they were designated because they were considered more obviously serious and damaging so that it was logical to assume damage arising from them. My conclusion is supported by the case of *Speight v. Gosnay*,⁷⁵ decided in 1891, shortly preceding the British parliament's passage of the Slander of Women Act. In *Speight*, the plaintiff's fiancé broke his engagement to marry her after she repeated to him a bit of gossip which impugned her own chastity. She then sued the person who had originally published the slander. The defendant denied that the plaintiff could establish requisite special damages from the original utterance because the only damage done was resultant from the plaintiff's own repetition.⁷⁶ The outcome of the case clearly turned on this issue. "Special damage" had occurred in the breaking of the

⁷⁵ [1891] 60 L.J.Q.B.Div. 239; see also *Lynch v. Knight*, [1861] IX H.L.C. 577 (expressing sympathy for female plaintiff who was unable to show special damages after defendant impugned her chastity to her fiancé).

⁷⁶ *Id.*

engagement, but it could not be causally linked to the plaintiff's statement. Parliament passed the Slander of Women Act just a few months after *Speight*. The close temporal proximity of these events indicates that *Speight* influenced the Act's passage. However, this is more likely because Parliament sympathized with the *Speight* plaintiff's inability to establish a requisite causal link in what they considered an egregious case. I do not think Parliament was motivated because very real special damages were not incurred by her or could never be established in such cases.

While the symbolic detriment of this designation as slander *per se* -- reinforcing gender stereotypes as it does -- troubles me, its focus on the sexual promiscuity meaning (as opposed to the unpleasant woman meaning of words like whore and bitch) presents a less difficult fact-opinion analysis. As established previously, suits of this sort are not particularly common, probably in part because women desire not to draw additional attention to such published allegations and in part because when words like "slut" and "whore" are directed at women, they often are not aimed at the target woman's reputation but rather are intended to inflict emotional or psychic injury. Besides, damages rules related to most cases of defamation -- namely libelous publications in jurisdictions where the distinction between libel and slander remains -- have alleviated the need to establish actual pecuniary loss in all cases,⁷⁷ without the corresponding implication that the most significant derogation of a women and that most worthy of redress regards her sexual propriety.

⁷⁷ See generally GATLEY, *supra* note 2, at ¶ 143; SMOLLA, DEFAMATION, *supra* note 2, at §§ 7.02, 9.06.

**V. THE GENDER IMPLICATIONS OF U.S.
FAULT AND DAMAGES STANDARDS:
NEW YORK TIMES TO DUN & BRADSTREET**

As noted previously, the U.S. Supreme Court in the 1964 case of *New York Times Co. v. Sullivan*⁷⁸ embarked upon the task of balancing its constitutional concern for free speech against the legally recognized and established value in an individual's reputation. The primary means of shifting this balance has been through imposition on the plaintiff's case of fault requirements more stringent than the common law's simple strict liability. In *New York Times* the Court held that public officials could recover for defamation only if able to establish the defendant's "actual malice" in publishing the objectionable statement.⁷⁹ "Public official" was subsequently defined as including "those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."⁸⁰ In separate rulings, the Supreme Court has expressly included in the category those who seek public office,⁸¹ but has clarified that not all public employees are to be considered public officials.⁸²

In 1967, the Court extended the more stringent fault requirement to defamation cases by plaintiffs classified as

⁷⁸ 376 U.S. 254 (1964).

⁷⁹ *Id.* at 279-80 (defining "actual malice" as publication with "knowledge [the statement] was false or with reckless disregard of whether it was false or not").

⁸⁰ *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) (footnote omitted; emphasis added) (wherein court remanded on issue of whether plaintiff Frank Baer, supervisor of a county recreational ski center, was a public official).

⁸¹ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974).

⁸² *Hutchinson v. Proxmire*, 443 U.S. 111, 119 n.8 (1979).

public figures.⁸³ Application of the actual malice standard continued to expand--even for a brief time to all matters of "general or public interest"⁸⁴--until the 1974 ruling in *Gertz v. Robert Welch, Inc.*⁸⁵ The *Gertz* case resolved several important issues related to both fault requirements and damages in private plaintiff defamation cases, while also clarifying the parameters of the public figure category. Leaving the *New York Times* actual malice standard in place for public official and public figure plaintiffs, the *Gertz* court established negligence as a *minimum* standard in private plaintiff cases. By so ruling, the Court returned to the individual states the decision regarding fault standards in private plaintiff cases. In the years since, an overwhelming majority have opted for the minimum negligence requirement.⁸⁶

⁸³ *Curtis Publishing Co. v. Butts*; *Associated Press v. Walker*, 388 U.S. 130 (1967). The former case involved a college football coach, the latter a former military official who reportedly had been involved in attempts to prevent desegregation of a public university in the American South.

⁸⁴ In *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), to even private plaintiffs if they were "involve[d] in an event of *public or general interest*." *Id.* at 31-32 (emphasis added).

⁸⁵ 418 U.S. 323 (1974). *Gertz* superseded and modified the *Rosenbloom* ruling, shifting the issue squarely back to plaintiff classification and rejecting issue classification.

⁸⁶ See generally SMOLLA, *DEFAMATION*, *supra* note 2, at § 3.10 (collecting cases from various states adopting the negligence standard). A few states have adopted higher fault standards in these cases. See, e.g., *Walker v. Colorado Springs Sun, Inc.*, 188 Colo. 86, 538 P.2d 450, cert. denied, 423 U.S. 1025 (1975); *AAFCO Heating & Air Conditioning Co. v. Northwest Publications, Inc.*, 162 Ind. App. 671, 321 N.E.2d 580 (1974), cert. denied, 424 U.S. 913 (1976); *Chapadeau v. Utica-Observer-Dispatch, Inc.* 38 N.Y.2d 196, 199, 341 N.E.2d 569, 571, 379 N.Y.S.2d 61, 64 (1975); see generally BRUCE SANFORD, *LIBEL & PRIVACY, THE PREVENTION AND DEFENSE OF LITIGATION* § 8.3.2 (Supp. 1987) [hereinafter SANFORD]; SMOLLA, *DEFAMATION* *supra* note 2, at § 3.11 - .12 (citing and discussing alternate standards).

In providing this option for greater protection for the reputations of private plaintiffs, the Gertz Court relied on twin rationales linked to perceived distinctions between public and private plaintiffs: degree of access to the media and something akin to general tort theory's "assumption of the risk."⁸⁷ Additionally, the Court articulated a dichotomy among public figures: the "universal", "unlimited", or "pervasive" public figures on one hand and the "limited" or "vortex" public figures on the other.⁸⁸ The former included those who had achieved such a significant role in issue resolution that their conduct is always a matter of legitimate public interest--particularly as related to their credibility or trustworthiness.⁸⁹ The latter category is less easily defined, but generally includes those who have "thrust themselves to the forefront of particular controversies" that are important to the general public, with a view to influencing the outcome of

⁸⁷ Gertz, 418 U.S. at 344.

⁸⁸ One commentator has studied the way in which the public official and public figure categories have been construed in cases. He has observed that the scope of *New York Times*-protected comment is broader in cases involving plaintiffs serving in the upper echelons of government. In other words, for those in positions of great power, almost anything can be related to fitness for public office. However, for those public officials at the lower end of the public service hierarchy, the relationship between the comment and the official's job performance or job fitness must be quite close and direct. See generally SMOLLA, *supra* note 2, at § 2.27[2]; see also *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809 (Tex. 1976), *cert denied*, 429 U.S. 1123 (1977) (civil engineer in private practice but doing the majority of the county's private consultation work did not have authority to act for the county or expend public funds and so was not a public official in relation to that work); *Clawson v. Longview Publishing Co.*, 91 Wash.2d 408, 589 P.2d 1223 (1979) (administrator of county motor pool was public official for purposes of report which alleged that he purchased automobile parts at county expense to repair automobile owned by sheriff's son; administrator had unsupervised power to make public expenditures and so defamation was directly related).

⁸⁹ Gertz, 418 U.S. at 336; see generally SMOLLA, *supra* note 2, at § 2.23 and authorities cited.

those issues.⁹⁰ These plaintiffs must establish the defendant's actual malice only when the objectionable publication is related to the particular controversy.⁹¹ *Gertz* was somewhat ambiguous in terms of the scope of its application, as the decision made references only to media defendants, never clarifying its applicability to non-media cases.⁹² In response, a number of states continued to follow their common law precedent in cases involving non-media defendants.⁹³

Equally as significant as the *Gertz* Court's pronouncements on fault was its decision regarding damages proof in certain categories of cases. The Court abolished the previous rule, which had presumed damage to reputation by a *per se* libel. Furthermore, in addition to clarifying that private plaintiffs must prove actual malice only if individual state jurisdictions decide they must, *Gertz*

⁹⁰ *Id.* at 345.

⁹¹ *Id.* at 349.

⁹² See, e.g., RESTATEMENT (SECOND), *supra* note 43, at § 580B comment e, § 613 comment j (1977) (indicating that *Gertz* is limited to "statement[s] published by the communications media" and in other cases, "[s]tates will be free to apply their own rules" which may or may not be the traditional common law ones). For additional discussion of the ambiguity left by *Gertz*, see generally James Brosnahan, *From Times v. Sullivan to Gertz v. Welch: Ten Years of Balancing Libel Law and the First Amendment*, 26 HASTINGS L.J. 777 (1975); Steve Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L.REV. 915 (1978); Note, *Mediaocracy and Mistrust: Extending New York Times Defamation Protection to Non Media Defendants*, 95 HARV. L. REV. 1876 (1982).

⁹³ See Shiffrin, *Defamatory Non-Media Speech*, *supra*; John Watkins and Charles Schwartz, *Gertz and the Common Law of Defamation: Of Fault, Nonmedia Defendants, and Conditional Privileges*, 15 TEX. TECH L. REV. 823 (1984); Comment, *The Law of Defamation: An Arkansas Primer*, 42 ARK. L. REV. 915, 961-62 (1989) (observing that Arkansas was among the jurisdictions applying *Gertz* only to media cases prior to *Dun & Bradstreet* in 1985).

imposed the actual malice requirement on private plaintiffs who sought presumed or punitive damages.⁹⁴

The next important Supreme Court pronouncement came in the 1985 ruling, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,⁹⁵ which clarified the *Gertz* media-nonmedia question, but created other ambiguities in the process. *Dun & Bradstreet's* plurality opinion by Justice Powell articulated a "public concern" test for imposition of the actual malice standard, noting that speech on matters of "purely private concern" merits less constitutional protection.⁹⁶ The plurality language said that "public concern" status is "determined by [the communication's] content, form, and context," apparently having less to do with the plaintiff's provocation of the publicity than the "public controversy" prong of the *Gertz* limited public figure test.

Dun & Bradstreet has led commentators to speculate that the Court has reverted to the common law's strict liability standard for cases brought by private plaintiffs and involving no matter of public concern.⁹⁷ This inference is drawn, in part, because the case specifically abolished the *Gertz* presumed and punitive damages rules⁹⁸ in this category of cases. Thus, the argument follows that it also eliminated the accompanying fault requirements.⁹⁹

⁹⁴ *Gertz*, 418 U.S. at 348-50.

⁹⁵ 472 U.S. 749 (1985).

⁹⁶ *Id.* at 758-59 (citing *Connick v. Myers*, 461 U.S. 13 (1983)).

⁹⁷ See SMOLLA, *DEFAMATION*, *supra* note 2, at § 3.11; Smolla, *New Analytic Primer*, *supra* note 17, at 1545-48; Note, *Does the Actual Malice Standard of Gertz v. Robert Welch, Inc. Apply to Speech on Matters of Purely Private Concern?*, 14 PEPPERDINE L. REV. 337 (1987).

⁹⁸ See *supra* note 94 and accompanying text.

⁹⁹ Interestingly, some commentators have also speculated that even public figures and public officials may be exempted from the actual malice standard where the absence of public concern can be established. Such cases surely would be few and far between, of course. For a comprehen-

The overall effect of these evolving constitutional doctrines has been to shift considerably the balance, of which I have spoken throughout this chapter, away from reputational interests and toward the interests of free speech.¹⁰⁰ But what has been their overall impact, if any, on women plaintiffs? On the private versus public sectors of life? Returning to the earlier observation that women have traditionally operated in the private sphere, the heightened public official and public figure fault requirements of *New York Times* and its immediate progeny would seem to have little effect on women plaintiffs because seldom could they anticipate inclusion in either category. However, this has not always been the case, attesting to an imperfect alignment between women and "the private", as well as between "the public" in the general jurisprudential versus First Amendment contexts. Well-known women entertainers, for example, have been considered all-purpose public figures.¹⁰¹ Although it is a sad commentary, some women have been deemed public figures simply by virtue of their associations with male celebrities.¹⁰² (I found no

sive discussion of this matter, see Smolla, *New Analytic Primer*, *supra* note 17, at 1542-45.

¹⁰⁰ Frederick Schauer attributes this shift in great part to the traditional import of the press in the United States. Schauer, *Social Foundations of Defamation*, *supra* note 3, at 18-19.

¹⁰¹ *E.g.*, *Burnett v. National Enquirer, Inc.*, 144 Cal. App.3d 991, 193 Cal. Rptr. 206 (1983), *appeal dismissed*, 465 U.S. 1014 (1984). As one commentator has observed, others likely to qualify would be Jane Fonda and former First Lady Jacqueline Kennedy Onassis. WATKINS, *MASS MEDIA AND THE LAW*, *supra* note 2, at 68. See generally SMOLLA, *SUING THE PRESS*, *supra* note 1, at ch. 1 (noting famous women plaintiffs of the 20th century: Burnett, Elizabeth Taylor, Shirley Jones, Lilliam Hellman, author Jackie Collins, and Kimerli Pring, Miss Wyoming 1978).

¹⁰² These women have included the wife of Johnny Carson and the former "number one girlfriend" of Elvis Presley. *Brewer v. Memphis Publishing Co.*, 626 F.2d 1238 (5th Cir. 1980), *cert. denied*, 452 U.S. 962 (1981), *noted in* WATKINS, *MASS MEDIA AND LAW*, *supra* note 2, at 68, 73.

case in which a man's relationship with a famous woman caused him to fall within the category.) Finally, various minor entertainers, nude dancers, belly dancers, a *Playboy* "Playmate of the Month", and a rape victim who was the chief prosecution witness at an infamous trial have been classified as limited purpose public figures.¹⁰³

Similarly, a president of a local civic or voluntary group would likely be deemed a limited purpose public figure. Such persons do thrust themselves into local controversies and do seek to influence decision making at the local level; thus they are public figures for the purpose of comment on those specific localized matters. This is certainly an area of increasing involvement for women, as they become leaders in their communities and in civic affairs, if not as extensively on the national stage.

One particularly interesting case in which a woman was not classified as a public figure but might well have been, is *Time, Inc. v. Firestone*.¹⁰⁴ Plaintiff Mary Alice Firestone sued when *Time* magazine reported that her former husband, heir to the Firestone industrial fortune, had been granted a divorce on grounds of her adultery. In fact, the technical grounds for divorce, while ambiguous in the decree, had not included adultery. Though the magazine argued that Mrs. Firestone was a public figure because the divorce suit was of great public interest, the Court rejected such a proposition. The ruling indicated that a person does not thrust himself or herself into a controversy simply by availing him or herself of the appropriate legal relief, here a divorce suit.¹⁰⁵ The Court stated that a divorce suit--even one of interest to the public because it involves wealthy individuals--is not the sort of "public controversy" referred to in *Gertz* as creating a

¹⁰³ See generally WATKINS, MASS MEDIA AND LAW, *supra* note 2, at 75-76.

¹⁰⁴ 424 U.S. 448 (1976).

¹⁰⁵ *Id.* at 454.

public figure.¹⁰⁶ The implication was that the determination is to be based upon what *should* interest people, not necessarily what *does* interest them. Some controversies are simply too trivial or inconsequential to be designated "public."

As for public official status, women are currently more likely to be included in this category, because they have risen in the ranks of public officials as gender barriers in various professions have been overcome in recent years. Though women still are less likely to serve in roles considered to be of significant public import, as they do, they increasingly will find themselves subject to the actual malice fault requirement.

Although hers was not a defamation action, and the jurisdiction concerned was Britain rather than the United States, the Clare Short complaint adjudicated by the Press Complaints Commission in 1991 provides an interesting scenario for U.S. constitutional analysis. Short, in her (then) seven-year career as the Labour MP for Ladywood (Birmingham), had been the subject of frequent negative media coverage, being portrayed as "a nun, a whore, and a dyke" at various times. Her 1991 complaint, however, was essentially one for invasion of privacy, although such claims are not formally recognized by English law.¹⁰⁷

Many of the comments about Short had been attacks on her style and personality, rather than on the substance of her policies or on her competence as a Member of Parliament. If she decided to sue for defamation, however, as a

¹⁰⁶ *Id.*

¹⁰⁷ Kate Muir, *Short story long on headlines*, *The Times* (London), Feb. 1, 1991, at 14. *But see* SMOLLA, *SUING THE PRESS*, *supra* note 1, at 5-6 (noting feminist attorney's Gloria Alfred's \$10 million suit against a California State Senator who characterized her as a "slick butch lawyer-ess").

result of being labeled a "dyke"--implying lesbianism¹⁰⁸--could she win? Under U.S. law, she would clearly be classified as a public official. However, I wonder whether she is a sufficiently high ranking public official as to make any personal matter--including her sexual orientation--subject to comment under the constitutional protection of the "actual malice" standard, requiring the defendant's knowledge of the material's falsity or with reckless disregard for whether or not it was false?

Several commentators have opined that the new *Dun & Bradstreet* "public concern" test is different from the "public controversy" part of the *Gertz* formulation for determining limited public figure status.¹⁰⁹ The distinction seems to be, essentially, that under *Dun & Bradstreet*, a plaintiff need not voluntarily step into the public arena in order to be part of a public controversy. Accordingly, the "assumption of risk" rationale no longer supports the rule because private figures may unwittingly become involved in matters of public concern and thus be subject to liability rules corresponding to the "public concern" category of speech. While the word "concern" suggests a more mature or discerning public response than the old *Rosenbloom* "general or public interest" test,¹¹⁰ I am uncertain of the extent to which it could be used to impose

¹⁰⁸ Cf. *Douglass v. Hustler Magazine, Inc.* 769 F.2d 1128 (7th Cir. 1985) (implication of lesbianism was embarrassing and cast plaintiff in a "false light," supporting suit for that variety of invasion of privacy tort).

¹⁰⁹ See Smolla, *New Analytic Primer*, supra note 17, at 1540-42; Note, *Defining a Public Controversy in the Constitutional Law of Defamation*, 69 VA. L. REV. 931 (1983).

¹¹⁰ Indeed, one commentator has observed that *Rosenbloom's* "general or public interest" test was used to expand first amendment protection to all such matters (whether or not plaintiffs were within the public official or public figure categories), while *Dun & Bradstreet's* "public concern" test was used to narrow free speech protection by limiting application of *Gertz's* restrictive damages rules. Smolla, *New Analytic Primer*, supra note 17, at 1541.

the more stringent fault requirement on women and others involuntarily drawn into matters judicially construed to be of public concern.

Perhaps more practically important than the shifting fault requirements of this line of cases have been the changing damages rules, particularly from *Gertz* to *Dun & Bradstreet*. As noted previously with regard to the discussion of common law slander *per se*, one positive result of the special category eliminating a female plaintiff's need to show special harm when a statement impugned her chastity was that she did not have to establish actual damages in order to recover.¹¹¹ This was significant because of the practical difficulty of proving actual harm resulting from such a statement. Similarly, the presumed damages rulings of *Gertz* and *Dun & Bradstreet* have a potentially great effect on suits brought by women and others functioning primarily in the private sphere.

Gertz imposed the requirement that, even in private plaintiff cases, actual malice must be shown before damage to reputation was presumed. This meant that findings of liability based upon negligence were meaningless to these women plaintiffs unless they could prove resultant harm to reputation. However, *Dun & Bradstreet* effectively eliminated this requirement, again allowing reputational damage to be presumed.¹¹² If opportunity for meaningful recovery is the admitted goal, *Dun & Bradstreet* is seemingly very significant for women who, because their public interactions have been relatively few as to be unlikely affected, must rely on such presumptions of harm.

¹¹¹ See *supra* note 74 and accompanying text.

¹¹² This ruling is consistent with Robert Post's thesis that communicative torts (e.g., defamation, privacy, intentional infliction of emotional distress) are not truly concerned with the consequences of a defendant's behavior; rather they are concerned with penalizing defendants who breach what he calls "civility rules." Post, *Public Discourse*, *supra* note 23, at 623-24.

VI. THE GENDER IMPLICATIONS OF THE FACT-OPINION DISTINCTION

In both England and the United States, only false statements of fact are actionable as defamatory. This rule is embodied in the fair comment privilege in England,¹¹³ just as it was at one time under the common law of the various U.S. jurisdictions.¹¹⁴ The rule allowed a defendant to utilize the fair comment defense so long as the statement (1) was based on fact and constituted a reasonable opinion based upon those facts; (2) pertained to a matter of public interest; and (3) was not actuated by malice.¹¹⁵

Since the 1974 case of *Gertz v. Welch*,¹¹⁶ the distinction between fact and opinion has taken on constitutional dimensions under U.S. law. In *Gertz*, Justice Powell wrote

Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. . . .

¹¹⁷

¹¹³ See generally BARENDT, FREEDOM OF SPEECH, *supra* note 6, at 178; CARTER-RUCK ON LIBEL, *supra* note 2, at 97-108; CRONE, LAW AND THE MEDIA, *supra* note 2, at 27-31; NEILL, DEFAMATION, *supra* note 28, at 57-74; GATLEY, *supra* note 2, at ¶¶ 691-748.

¹¹⁴ See generally WATKINS, MASS MEDIA AND LAW, *supra* note 2, at 92-94; BRUCE SANFORD, LIBEL AND PRIVACY: THE PREVENTION AND DEFENSE OF LITIGATION, § 5.2 (Supp. 1987); SMOLLA, DEFAMATION, *supra* note 2, at § 6.02; Comment, *The Law of Defamation: An Arkansas Primer*, 42 ARK. L. REV. 915, 1015-16 (1989); Note, *The Fact-Opinion Determination in Defamation*, 88 COLUM. L. REV. 809, 811 (1988) [hereinafter, Note, *Fact-Opinion Determination*].

¹¹⁵ See generally BARENDT, FREEDOM OF SPEECH, *supra* note 6, at 178; CRONE, LAW AND THE MEDIA, *supra* note 2, at 26-33; NEILL, DEFAMATION, *supra* note 25, at 57; SMOLLA, DEFAMATION, *supra* note 2, at § 6.02; WATKINS, MASS MEDIA AND LAW, *supra* note 2, at 92.

¹¹⁶ 418 U.S. 323 (1974).

¹¹⁷ *Id.* at 339-40.

The notion that there is no such thing as a false idea is a powerful one, and it pervades U.S. First Amendment doctrine. This statement also points up well the important link between the fact-opinion dichotomy and the truth-falsity determination in definition. That is, the truth or falsity of a statement of opinion can hardly be verified for the very reason that it is an opinion.

The criteria for distinguishing fact from opinion are, however, nebulous and largely meaningless, so that the evaluation of a given publication is seldom a simple task. The current standard is *Milkovich v. Lorain Journal Co.*,¹¹⁸ a 1990 decision of the U.S. Supreme Court. The Court in *Milkovich* held that, where a media defendant is involved, a statement on a matter of public concern must be provable as false before liability attaches, thus ensuring full constitutional protection for a statement of opinion with no provably false factual connotation.¹¹⁹ Statements that cannot reasonably be interpreted as stating actual facts about an individual are protected.¹²⁰ The court clarified that the *Gertz* dictum, noted above, did not create an exemption for opinion.¹²¹

A case still very important in drawing the line between fact and opinion is *Ollman v. Evans*,¹²² a 1984 decision of the U.S. Court of Appeals for the District of Columbia. The plurality in *Ollman* enumerated four factors to be considered in making the determination: the specificity of the terms used, verifiability, linguistic con-

¹¹⁸ 497 U.S. 1 (1990).

¹¹⁹ *Id.* at 16-20 (citing and discussing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986)).

¹²⁰ *Id.* at 17 (citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988)).

¹²¹ *Id.* at 19.

¹²² 750 F.2d 970 (D.C.Cir.1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985).

text, and social context.¹²³ Application of these factors to the previously stated Clare Short scenario makes for interesting analysis. The label "dyke" implies damaging facts, namely lesbianism. However, though it is facially highly damaging, in certain contexts it could be construed merely as a sharp expression of criticism or disapproval, and thus opinion.¹²⁴ What if the statement were made in a private rather than a public forum or manner? Seemingly, the likelihood that it would be construed as actionable fact is even greater, in the absence of mitigating factors such as some relation to public discourse. The vagaries of application are apparent from consideration of this relatively simple exception.

Additionally, many misogynist insults which women suffer are simply not capable of verification -- or more accurately perhaps -- quantification. Consider, for example, the statement that a man is a thief. If he has been convicted of a single count of theft, the statement may easily be adjudged factual and true.¹²⁵ On the other hand, consider the statement that a woman is a "slag" or "slut". In certain contexts, the label clearly would be construed as an assertion of fact. The general implication is that the woman is sexually promiscuous. But is this verifiable? Is it quantifiable (how many times does a woman have to commit adultery before she is accurately labelled "sexually promiscuous")? What if it were proven that she, as a single woman, were not a virgin? What if it were proven that she once had sex with a man she picked up in a pub?

¹²³ *Id.* at 979.

¹²⁴ *Id.* at 976-77 discussed in Note, *Fact-Opinion Determination*, *supra* note 114, at 821.

¹²⁵ *But see Vern Sims Ford, Inc., v. Hagel*, 42 Wash. App. 675, 683, 687, 713 P.2d 736, 738, 741-42 (1986) (heading on a flyer that "Vern Sims Ford and Their Sales person Bob Martin are Thieves!!!" deemed unprotected assertion of criminal activity; however, as rationale court stated that even in the form of opinion, accusations of criminal activity are not constitutionally protected).

What if it were proven that she regularly engaged in "one-night stands"? Are we merely to leave the determination to a jury applying community standards? Such a determination only becomes increasingly difficult when the multiple connotations of a word like "bitch" are contemplated; after all, the word often means "hateful" or "unpleasant" -- accusations equally or more difficult to quantify or verify. This is not to say that these categories of insults are mutually exclusive according to gender, just that the myriad gender-specific insults and labels with which women are bombarded in our society¹²⁶ prove particularly elusive of the current fact-opinion analysis and, as a related matter, of any truth-falsity determination.

The fact-opinion issue associated with words like "bitch" is well illustrated by the case of *Lee v. Metropolitan Airport Commission*.¹²⁷ In that case, the plaintiff's fellow employees referred to her as a "bitch," and described her as "fluffy" and "flirtatious," at a meeting with superiors who were considering the plaintiff's promotion. The court held that these statements were too imprecise to be actionable in defamation.¹²⁸ In finding that listeners would not believe these to be statements of fact, the court noted the context in which the statements were made, which it characterized as "office gossip and banter."

¹²⁶ See Schultz, *The Semantic Derogation of Women*, in LANGUAGE AND SEX: DIFFERENCE AND DOMINANCE 64, 71-72 (B. Thorne & N. Henley eds. 1975); see also C. MILLER & K. SWIFT, WORDS AND WOMEN, 109 (1977).

¹²⁷ 428 N.W.2d 815 (Minn. App. 1988).

¹²⁸ *Id.* at 820-21 (citing *Janklow v. Newsweek, Inc.*, 788 F.2d 1300 (8th Cir.), cert. denied 479 U.S. 883 (1986)); see also *Finck v. City of Tea*, 443 N.W.2d 632 (S.D.1989) (holding that statements characterizing the plaintiff chief of police as a "dumb son-of-a-bitch" and "incompetent" in front of city council and others were not slanderous because they were statements of opinion rather than fact.)

The case of *Ward v. Zelikovsky*¹²⁹ is similarly illustrative. There the defendant called the plaintiff a "bitch" and a Jew hater at a condominium association meeting. The court found the words not capable of defamatory meaning, stating that "name calling, epithets, and abusive language, no matter how vulgar or offensive, are not actionable" in defamation.¹³⁰ The court noted that the greater the "fact content" in an allegedly defamatory statement, the greater the likelihood it could be defamatory. "'[L]oose, vituperative or hyperbolic language' [is] less likely to be deemed non-actionable."¹³¹ Accordingly, the plaintiff's case failed.

While the denial of recovery in *Lee* and *Ward* illustrates well the vagaries of words like "bitch" and "slut," especially in light of the fact-opinion dichotomy in defamation law, the holdings in these cases are less troubling to me, in part because the statements were made impulsively in the context of disputes and in part because they did not involve media defendants. I believe the courts in those cases were correct that the words and phrases were not defamatory, which is not necessarily to say they were not injurious. The case of *Pring v. Penthouse Int'l Ltd.*,¹³² however, is far more problematic. Although the court purports to rely on an appropriate

¹²⁹ 643 F.2d 972 (N.J.1994).

¹³⁰ *Id.* at 978 (quoting RODNEY SMOLLA, LAW OF DEFAMATION, § 6.12[9]). *But see* *Smith v. Atkins*, 622 So. 2d 795 (La. App. 4 Cir. 1993) (majority considered calling woman a "slut" slander *per se*; dissenting judge considered it a factual determination for jury in light of context in which spoken); *Contento v. Mitchell*, 28 Cal. App.3d 356, 104 Cal. Rptr. 591 (1972) (calling woman "bitch," "thief," and "whore" in front of third parties is slander *per se*).

¹³¹ *Id.* (citing, among other sources, *Milkovich*, 497 U.S. at 17; *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976) (holding "fascist," "fellow traveler," and "radical right," although strong and hate filled, were opinions).

¹³² 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983).

distinction between "fact" and "opinion",¹³³ the judicial opinion illustrates well the court's lack of understanding about what is and is not "defamatory" of women. In *Pring* the court relied on a non-sensical and unduly technical analysis to deny relief to the female plaintiff, resulting in a gross misunderstanding and, I believe, misapplication of the spirit of the law.

The plaintiff in *Pring* was a former "Miss Wyoming" who had performed a baton twirling routine as her talent in the Miss America pageant. The allegedly defamatory article, published in *Penthouse* magazine, described a "Miss Wyoming" who was a baton twirler.¹³⁴ The woman was depicted as contemplating a past incident when she performed fellatio on a high school football player, causing him to levitate. The *Penthouse* story continued that, on stage at the Miss America pageant, she performed a "fellatio-like act on her baton," which stopped the orchestra.¹³⁵ Subsequently, she was said to have fantasized about how she could "save the world" with her "real talent" by performing such acts on world leaders. The story ends with a description of the woman performing fellatio with her coach at the edge of the stage, causing him to levitate as the TV cameras filmed them.¹³⁶

The Tenth Circuit Court of Appeals defeated the plaintiff's suit on the basis that no false representation

¹³³ The opinion does not actually use fact-opinion terminology, but it does rely for precedent on cases making that distinction. In fact, the case seems to feature more of a fact v. "rhetorical hyperbole" or fact v. satire analysis.

¹³⁴ There was a separate identification issue discussed both at the trial and appellate court levels, but it was decided in favor of the plaintiff, with a finding that she was identifiable from the story. *Id.* at 438-39.

¹³⁵ *Id.* at 441.

¹³⁶ *Id.*

of fact was made in the article.¹³⁷ The court described the *Penthouse* article as apparently "fanciful", and said it did not purport to be a factual account.¹³⁸ The court characterized levitation as the "central theme" of the article and the three "incidents"--apparently referring to the acts of fellatio--as fantasy.¹³⁹ Noting that the incidents described supposedly occurred on national television, the court concluded that "the story could not be taken literally, and the portions charged as defamatory could not reasonably be understood as a statement of fact."¹⁴⁰

I agree with dissenting Judge Breitenstein that the two judges in the majority missed the point. As he noted, the article contained both fact and fiction, the act of fellatio comprising the factual portion of the story even if the other parts were fantasy only.¹⁴¹ "Penthouse cannot escape liability by relying on the fantasy used to embellish the fact. . . . The word 'fellatio' was not used as an hyperbole or epithet. It was used to describe a physical

¹³⁷ *Id.* at 440 (citing *Letter Carriers v. Austin*, 418 U.S. 264 (1974), *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), *Greenbelt Pub. Ass'n v. Bresler*, 398 U.S. 6 (1970)).

¹³⁸ *Id.* at 441. *Cf.* *Linebaugh v. Sheraton Michigan Corp.*, 497 N.W.2d 585 (Mich. Ct. App. 1993) (cartoon depicting female plaintiff engaged in sex act with someone other than her husband was actionable per se).

¹³⁹ *Id.*

¹⁴⁰ *Id.* Furthermore, the court unwisely relied upon the fact that the plaintiff's own witnesses had testified that "the story could not possibly be about her as she would not do that." *Id.* (emphasis added). I fail to see what the statements of these witnesses prove in relation to the court's fact-opinion focus. After all, they did not say that she "could" not do it, only that she "would" not do it. The word choice implies that these witnesses referred to their perceptions of her character, not to her actual physical ability to make a man levitate by performing fellatio on him.

¹⁴¹ *Id.* at 443 (Judge Breitenstein dissenting).

act."¹⁴² The Judge went on to explain why participation in fellatio was indeed defamatory, noting that it had "long been recognized as an act of sexual deviation or perversion" and was within the crime of sodomy according to some states' laws.¹⁴³

Interestingly, neither the majority nor the dissenting opinion addressed the general implication of the article: that Miss Wyoming was a woman with questionable sexual morals. The majority opinion did, however, note that the plaintiff had amended her complaint to avoid answering various interrogatories during the pre-trial discovery process. The effect was to narrow her cause of action to the three mentions of fellatio and

limited them to the descriptions with no general implications. This had three consequences: the trial court limited defendants as to what they could question plaintiff about--no sex history; prevented plaintiff from any use of general imputations of immorality; and caused a reliance on the particular descriptions.¹⁴⁴

Perhaps another important inference about women and defamation suits may be drawn from the *Pring* plaintiff's litigation tactics: she chose to forego her best opportunity for a defamation victory--a general imputation of immorality--to avoid having her sexual morality made an issue at trial. That is, the truth of a defamatory statement is almost always an issue in a defamation trial because if a statement is true, a plaintiff cannot recover. Furthermore, the Supreme Court in the 1986 case of *Philadelphia Newspapers, Inc. v. Hepps*¹⁴⁵ held that the plaintiff must bear the burden of proof as to the falsity of the

¹⁴² *Id.* at 444.

¹⁴³ *Id.* (citing *Hunt v. Oklahoma*, 683 F.2d 1305 (10th Cir. 1982)).

¹⁴⁴ *Id.* at 441.

¹⁴⁵ 475 U.S. 767 (1986).

statement in question if the objectionable statement regards a matter of public concern.¹⁴⁶ Accordingly, if her sexual morals generally (as opposed to the specific acts of oral sex) had constituted the defamatory statement, the plaintiff would have faced the same sort of exposure of her private sex life that rape victims experienced prior to the adoption of so-called rape shield laws.¹⁴⁷ Furthermore, if somehow the statements in question were construed to be of public concern (a decision not outside the realm of possibility given what the Miss America pageant represents in American culture; recall the "dethroning" of Miss America Vanessa Williams when pre-title nude photos of her came to light), she would additionally have borne the burden of proof as to her sexual scruples.

As the *Pring* trial proceeded (although this issue was not reached by the appellate court because they did not get past the defamatory statement of fact threshold), only her engagement in oral sex with her former coach and the implicated high school football player could have been an issue. It is not surprising, under these legal rules, that *Pring* chose to confine her case in this way.

This procedural aspect of the *Pring* case makes one curious about the influence such considerations must have

¹⁴⁶ *Id.* at 1564-65. The *Hepps* holding was narrowly tailored to the case at hand. The opinion noted that the plaintiffs therein were private figures, but that the statement was one of public concern. The Court expressly declined to comment upon the quantity of proof required to establish falsity. *Id.* at 1565 n. 4. Finally, the Court noted that the case involved a media defendant and it expressed no view as to whether the same rule would apply in the nonmedia context. *Id.* (citing *Hutchinson v. Proxmire*, 443 U.S. 111, 133 n.16 (1979)).

¹⁴⁷ "Rape shield" is the common label for laws that prohibit questioning a rape prosecutrix about her past sexual history or behaviour absent a determination of the specific relevance of this information. For example, a judge may allow limited questioning regarding the sexual history between the prosecutrix and defendant in a case where the defense is consent.

on female plaintiffs seeking redress for sexuality- or gender-related defamation. Like rape victims in some jurisdictions and in days gone by, many are naturally reluctant to have their sexual histories put at issue in a public trial.¹⁴⁸ Again we see that which should be private about women is made public, this time when the women seek public redress for injury caused by a communicative tort.¹⁴⁹

Another recent case resembling *Pring* in several regards involved a male plaintiff, but one whose treatment by the media many would characterize as "feminizing" him by virtue of its focus on his sexuality.¹⁵⁰ The case is *Hustler Magazine, Inc. v. Falwell*,¹⁵¹ and the suit stemmed from a so-called "ad parody" in the publication about the Reverend Jerry Falwell, a "televangelist" and well-known leader of the Moral Majority, a conservative political action group in the United States. The ad featured a photograph of the Reverend Jerry Falwell and the text of an interview attributed to him. It portrayed Falwell as a hypocritic and drunkard whose first sexual encounter was an incestuous one with his mother, who was also depicted as drunken and immoral.¹⁵² Falwell sued for defamation, among

¹⁴⁸ See generally SUSAN ESTRICH, *REAL RAPE*, ch. 3 (1987).

¹⁴⁹ It is interesting to note on this point that in *Time, Inc. v. Firestone*, the U.S. Supreme Court said that the plaintiff, Florida socialite Mary Alice Firestone, did not become a "public figure" simply by virtue of her resort to legal means for redressing the grievance against her husband. See *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), discussed at *supra* notes 104-06 and accompanying text.

¹⁵⁰ By his "feminization", I refer to the way in which he was portrayed in a way women are often portrayed. That is, the commentary about him focused upon his sexual nature, just like cutting comment about a woman likely would. See Chapter 7, Sect. I.

¹⁵¹ 485 U.S. 46 (1988), reviewing *Falwell v. Flynt*, 797 F.2d 1270 (4th Cir. 1986).

¹⁵² *Falwell*, 797 F.2d at 1272.

other causes of action.¹⁵³ The jury made an express finding, however, that the ad could not be construed as a factual assertion, and accordingly the defamation cause of action failed.¹⁵⁴ The case nevertheless proceeded on the intentional infliction of emotional distress cause of action.

The similarities between *Pring* and *Falwell* are apparent. Both involved outrageous and offensive statements that were characterized as humor or parody by the respective publications.¹⁵⁵ Both made the plaintiff's sexual morality the basis of attack. Finally, both decision makers--the judges in *Pring* and the jury in *Falwell*--determined that the statements were not understood as assertions of fact and, therefore, could not be defamatory.

Yet both cases are troubling in that they provide no redress for vicious verbal attacks or for the resulting reputational and psychic injuries. While parody or satire is indeed obviously the form of the publications, both use this form as a guise to deter liability for the message of sexual immorality that comes through loud and clear. As one commentator has noted, you can label it "rhetorical hyperbole" or "satire" or "humor", but it does convey a

¹⁵³ *Id.* *Falwell* also pleaded invasion of privacy, but the U.S. district court judge dismissed the claim. *Id.* at 1270-71. Additionally, *Falwell* pleaded intentional infliction of emotional distress, and it was that cause of action which survived to take the case to the U.S. Supreme Court. This portion of the case is discussed *infra* at notes 176-79 and accompanying text.

¹⁵⁴ *Id.* at 1273.

¹⁵⁵ In its table of contents, *Penthouse* characterized the article about "Miss Wyoming" as "Humor." *Pring*, 695 F.2d at 442, 444. *Hustler* classified the offensive interview on the same page as an "ad parody" and in the table of contents as "Fiction; Ad and Personality Parody." *Falwell*, 797 F.2d at 1272.

meaning. The legal question, however, is simply whether that meaning is fact or opinion.¹⁵⁶

From this analysis, one can conclude that defamation law is often an ineffective redress for one type of communicative injuries that women often suffer: sexually hateful epithets used to label women. Other communicative torts may, however, fill the gap, especially as they are more fully developed over time. Following are brief analyses of several, including invasion of privacy, group defamation, and intentional infliction of emotional distress.

VII. DEFAMATION AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Although defamation law has historically focused upon injury to reputation and the "external" injury associated with the perceptions of others, defamation increasingly intersects with the sort of "internal" injury that communicative torts may inflict on one's emotional well-being. These intersections occurred initially in damages elements and calculations but more recently have become evident as plaintiffs have increasingly used defamation and infliction of emotional distress as alternate causes of action based upon the same offending publication.

While some very early defamation cases spoke of emotional distress as an element of a damages award for defamation, it was not until the *Gertz* Court curbed the recovery of presumed damages¹⁵⁷ that such injury gained greater recognition and more open acknowledgment. This was due, at least in part, to judicial attempts to circumvent the requirement that some type of actual harm be shown in order for a private plaintiff, who was unable to show actual malice and establish presumed damages, to recover

¹⁵⁶ Robert Post, *Public Discourse*, *supra* note 23, at 652.

¹⁵⁷ See *supra* note 94 and accompanying text.

something beyond nominal damages. In fact, in Justice Powell's opinion in *Gertz*, in which the requirement of "actual injury" was imposed, he wrote that such injury could include "impairment of reputation and standing in the community, personal humiliation, and *mental anguish and suffering*."¹⁵⁸

Two years later in *Time, Inc. v. Firestone*¹⁵⁹ the Court clarified that emotional harm alone is enough to support a claim of actual damages, even absent any showing of actual injury to reputation.¹⁶⁰ However, *Firestone* did not mean that individual states were compelled to allow recovery solely for emotional injury; it simply meant that doing so was constitutionally permissible.¹⁶¹ Subsequently, several states clarified that they considered emotional harm damages merely parasitic to the reputational harm, which still required proof prior to any recovery.¹⁶² Otherwise, they reasoned, no valid claim for defamation was stated and restrictions otherwise imposed for torts like intentional infliction of emotional distress could be avoided.¹⁶³ Whatever the particularities of a jurisdiction's laws regarding emotional harm recovery,

¹⁵⁸ 418 U.S. 323, 348-50 (1974) (emphasis added).

¹⁵⁹ 424 U.S. 448 (1976).

¹⁶⁰ *Id.* at 460-61.

¹⁶¹ See generally David Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L.REV. 747, 760 (1984).

¹⁶² These states included Kansas, New York, and Arkansas. *Id.* at 758-59 (citing *Little Rock Newspapers v. Dodrill*, 281 Ark. 25, 660 S.W.2d 936 (1983); *Gobin v. Globe Publishing Co.*, 232 Kan. 1, 649 P.2d 1239 (1981); *France v. St. Clare's Hosp. & Health Center*, 82 A.D.2d 1, 441 N.Y.S.2d 79 (1981); *Salomone v. MacMillan Publishing Co.*, 77 A.D.2d 501, 429 N.Y.S.2d 441 (1980)).

¹⁶³ These rulings, of course, run contra to Robert Post's earlier noted theory that communicative torts are really concerned not with the type of injury a defendant suffers, but rather with maintaining "civility." See *supra* note 112.

recognition of the emotional harm damages consequent to a defamatory publication has expanded in recent years.

Meanwhile, the tort of intentional infliction of emotional distress has gained independent acceptance as a means of redressing a category of grievances previously lacking legal injury status.¹⁶⁴ The tort was initially proposed in the United States in the 1930s, but was not included in the American Law Institute's Restatement of Torts until 1948.¹⁶⁵ That initial entry, at Section 46, stated: "One who, without a privilege to do so, intentionally causes severe emotional distress to another is liable (a) for such emotional distress and (b) for bodily harm resulting from it."¹⁶⁶ Currently, establishing the tort in most U.S. jurisdictions requires extreme and outrageous conduct, intentionally or recklessly inflicted, that causes severe emotional distress.¹⁶⁷

¹⁶⁴ Prior to adoption of the tort, defamation, trespass, assault, and battery were among the causes of action available for similar injury.

¹⁶⁵ For a more detailed history of the tort's development, see Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936); Willard Pedrick, *Intentional Infliction: Should Section 46 Be Revised?*, 13 PEPPERDINE L. REV. 1 (1985); William Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939); William Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40 (1956); John Wade, *Tort Liability for Abusive and Insulting Language*, 4 VAND. L. REV. 63 (1951).

¹⁶⁶ RESTATEMENT OF TORTS § 46 (Supp. 1948). Interestingly, women have played a prominent role in the development of the tort. In a sense, the tort developed to redress injuries not necessarily peculiar to women, but certainly more common among them than among men. See generally Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fear: A History*, 88 MICH. L.J. 814 (1990).

¹⁶⁷ See, e.g., *Lee v. Metropolitan Airport Commission*, 428 N.W. 2d 815, 823 (Minn. App. 1988).

In English law, the tort was recognized much earlier, in the 1895 case of *Wilkinson v. Downton*.¹⁶⁸ Although the tort did not initially enjoy the same sort of development in England as its U.S. counterpart, the recent case of *Khorasandjian v. Bush*¹⁶⁹ raises the possibility -- even likelihood -- that the cause of action or one closely akin to it could be relied upon to provide legal recourse in some communicative tort situations that are of special concern to women. In *Khorasandjian*, the female plaintiff and male defendant had been friends off and on for about 18 months when the female plaintiff told the male defendant that she wanted nothing more to do with him. In the ensuing months, he threatened her with violence, followed her around shouting abuse, pestered her with phone calls, and stole her handbag. As a result of the threats and abusive behavior, he was arrested, but the harassment continued after his release. The plaintiff sued for an injunction, and the court recognized a cause of action based in part on *Wilkinson* and in part on the case of *Janvier v. Sweeney*,¹⁷⁰ in which verbal threats to a person were considered actionable if they caused illness. Illness was defined as either "recognisable psychiatric illness with or without psychosomatic symptoms" and was said to include so-called "nervous shock" though not "mere emotional distress."¹⁷¹ Although the *Khorasandjian* plaintiff showed no evidence of such illness, the court saw "an obvious risk that the cumulative effect of continued and unrestrained further harassment such as she had undergone would cause such an illness."¹⁷² While the facts of *Khora-*

¹⁶⁸ Q.B. Div. [1895-99] All E.R. Rep. 267 (admitting that the case was without precedent).

¹⁶⁹ [1993] 3 All E.R. 669.

¹⁷⁰ [1919] 2 KB 316.

¹⁷¹ *Khorasandjian*, 3 All E.R. at 676-77.

¹⁷² *Id.*

sandjian would not lend themselves to a defamation action as well as the emotional distress-type action, the case does illustrate another type of communicative injury that women suffer, and to which it appears that English courts are increasingly sensitive.

The distinction now recognized between defamation and intentional infliction of emotional distress is similar to the differentiation of injury to reputation from the "offense of insult" that is implicitly recognized in France, Germany and countries adopting Roman-Dutch law¹⁷³ with its refusal to make truth an absolute defense. The overlap between intentional infliction of emotional distress and communicative torts like defamation and privacy was slow in developing, perhaps because early perceptions of the former did not envision it redressing injury caused purely by speech.¹⁷⁴ One survey suggests that the number of intentional infliction of emotional distress cases arising purely from speech has been very small.¹⁷⁵ However, one such case in the past decade has been very important, eventually reaching the Supreme Court and forcing a

¹⁷³ See Schauer, *Social Foundations*, *supra* note 3, at 11.

¹⁷⁴ Interestingly, this was not so in *Wilkinson v. Downton*, which involved "merely" speech, specifically falsely informing the plaintiff that her husband had been seriously injured. The *Wilkinson* court did discuss slander cases as potentially providing precedent, although it eventually dismissed the notion.

¹⁷⁵ Jean C. Love, *Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress*, 47 WASH. & LEE L. REV. 123, 126 (1990). However, cases involving both speech and conduct have been more plentiful, including a number of sexual and racial harassment cases. *Id.* See also generally Terrance Mead, *Suing the Media for Emotional Distress: A Multi-Method Analysis of Tort Law Evolution*, 23 WASH. L.J. 24 (1983).

decision regarding First Amendment implications for the tort. That case was *Hustler Magazine v. Falwell*.¹⁷⁶

In *Falwell*, as noted above, the Reverend Jerry Falwell sued *Hustler* magazine based on an ad parody which depicted him as having engaged in incestuous relations with his mother.¹⁷⁷ The jury awarded Falwell substantial damages based on his intentional infliction of emotional distress claim.¹⁷⁸ However, the Supreme Court subsequently reversed that award, finding that neither the trial court nor the appellate court had used the proper fault standard to assess the defendant's behavior. The Supreme Court held that the ad parody was protected, ruling that faultless liability would not be imposed for an opinion dealing with public figures and public concerns, even where emotional distress was intentionally inflicted. That is, liability for intentional infliction of emotional distress would not attach unless it was inflicted by a false statement of fact that had been made "with knowledge that the statement was false or with reckless disregard as to whether or not it was true."¹⁷⁹

The First Amendment protection in which *Falwell* shrouds such vituperative comment is, at first blush, astonishing. It is important, however, to recognize the Court's precise holding on the specific facts of *Falwell*,

¹⁷⁶ 485 U.S. 46 (1988), reviewing *Falwell v. Flynt*, 797 F.2d 1270 (4th Cir. 1986). The case spawned a great deal of comment, mostly because of the First Amendment implications. See generally RODNEY SMOLLA, *JERRY FALWELL V. LARRY FLYNT* (1988); David Anderson, *Tortious Speech*, 47 WASH. & LEE L. REV. 71 (1990); Robert Drechsel, *Intentional Infliction of Emotional Distress: New Tort Liability for Mass Media*, 89 DICK. L. REV. 339 (1985); Post, *Public Discourse*, supra note 23; Rodney Smolla, *Emotional Distress and the First Amendment: An Analysis of Hustler v. Falwell*, 20 ARIZ.ST.L.J. 423 (1988).

¹⁷⁷ See supra notes 150-54 and accompanying text (providing additional detail about the *Falwell* case).

¹⁷⁸ *Falwell*, 797 F.2d at 1271.

¹⁷⁹ 485 U.S. 46, 56 (1988).

affording such protection only to speech about public figures and public officials.¹⁸⁰ The Court did not specifically address inconsistencies between *Falwell* and prior decisions on outrageous or offensive communications. Nor did it provide rules for similar cases when the variables shift a bit -- for example when the object of the communication is a private figure or when the offensive statement is privately communicated.¹⁸¹ As one commentator has argued, even though the Court never explicitly made the point, the fact that Flynt communicated his insult to Falwell in a vehicle of mass communications that could be understood as provoking public debate, is all important to the Court's ruling. Conveyance of the insult in a personal letter or phone call almost certainly would not have led to the same decision.¹⁸²

To the extent that women remain less likely to be public figures or to be involved in matters of public concern, they are less likely to be subject to the narrow rule of *Falwell* when they are plaintiffs in intentional infliction of emotional distress actions. In fact, it seems that many of the very personal misogynist insults with which women may be particularly concerned are clearly not within the rule of *Falwell* and that those statements are therefore less likely to be protected by the First Amendment. The Clare Short situation, discussed above, is a notable exception because she is a public figure. The insults heaped upon her by the *News of the World* and other publications, while not as caustic as those directed by *Hustler* at Falwell, are similarly susceptible to characterization (in defense, of course) as humour or satire, though such classification does not lessen their sting. (Indeed, it seems sexual matters are among the matters most suscep-

¹⁸⁰ *Id.*

¹⁸¹ See generally Post, *Public Discourse*, *supra* note 23, at 614-15.

¹⁸² *Id.* at 675.

tible to characterization as humour or satire). Under U.S. constitutional analysis, however, Short would almost certainly be left without a remedy as Falwell was, because the comments were made in a public manner, arguably provoking public discourse about a topic appropriately open to public discussion: her general character.

I believe that the increasingly visible nexus between the tort of defamation and the mental suffering caused by offensive statements or communicative torts is significant for women plaintiffs and for others operating primarily in the private sector. As discussed previously, the reputational injuries traditionally redressed by defamation laws have sought to keep whole those interacting in the market or public sector in order that they might be able to continue to interact and to deal on a level field. However, recognition that an internal sort of psychic injury -- a self-respect or personal dignity injury -- may also be inflicted upon one who is the object of vitriolic comments signals a helpful shift for women and others whose public images may be of secondary concern after their psychic well-being because they function primarily in the private (domestic) sphere.

VIII. DEFAMATION AND INVASION OF PRIVACY

As noted previously, one of the reasons that defamation may initially appears to intersect with the private sphere of society is that defamatory statements sometimes reveal false information that is about a private matter -- that is, a matter the defendant wishes to keep private. For example, when a woman's chastity is impugned, the defamatory information is of a private nature. This is less likely to be the case with male plaintiffs, who are more apt to be defamed by an admittedly public matter, e.g., their criminal activity or lack of business acumen.

United States law recognizes an alternative cause of action which an individual may bring if the objectionable publication is of a private nature. This cause of action

is for invasion of privacy, and it is available to plaintiffs in some instances even when the information published is not false. The initial privacy action, proposed in an 1890 *Harvard Law Review* article by Samuel Warren and Louis Brandeis was for publication of true private facts.¹⁸³ Three other varieties of the tort are now widely recognized: (1) appropriation for commercial use; (2) portrayal in a false light; and (3) intrusion.¹⁸⁴

Such an alternative cause of action is not available in Britain, where privacy suits are not generally recognized.¹⁸⁵ One of the unresolved issues related to the matter is the delineation of the boundaries of a zone of privacy.¹⁸⁶ Several English cases have nevertheless implicitly recognized something akin to a right of privacy.¹⁸⁷

Many scholars have discussed the legal intersection (and overlap) of privacy and defamation in U.S. law. While the privacy tort evolved in a legal environment in which many in the judiciary perceived a need for it to redress grievances not then covered by the tort of defamation, many cases lend themselves to alternative pleadings of defamation and either or both the "public disclosure of private

¹⁸³ Samuel Warren and Louis Brandies, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

¹⁸⁴ These four categories were designated by Dean Prosser in an important early article analyzing more than 200 privacy cases decided by that time. William Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960). See also generally WATKINS, MASS MEDIA AND LAW, *supra* note 2, at 114-71; SMOLLA, DEFAMATION, *supra* note 2, at § 10.01[2].

¹⁸⁵ See generally BARENDT, FREEDOM OF SPEECH, *supra* note 6, at 173, 189; CRONE, LAW AND THE MEDIA, *supra* note 2, at 21.

¹⁸⁶ O'DONOVAN, SEXUAL DIVISIONS, *supra* note 20, at 6.

¹⁸⁷ See, e.g., *Prince Albert v. Strange*, [1848] 2 DeG & Sm. 652, 697 (noting the need for protection from "an unbecoming and unseemly intrusion . . . into the privacy of domestic life"); *Argyll*, [1967] Ch. 302. (disclosure of matters revealed in marital confidence restrained by court); see also Chapter 5.

facts" or "false light invasion of privacy" prongs of the tort.¹⁸⁸ Furthermore, notable commentators continue to argue that the torts are redundant, for example, because pride is the prime motivation for both torts.¹⁸⁹ One writer has identified the common link as the goal of maintaining "civility rules" or norms in society.¹⁹⁰ Others have linked the torts' sociological bases. Frederick Schauer has written

The weight to be given to individual reputation must parallel the weight a society places on the importance of reputation, and to a large extent the weight society places on reputation coincides with the significance of individual privacy. At the heart of the strict liability which exists in the common law of defamation is the view that someone's life or affairs are presumptively private, just as is their real and personal privacy.¹⁹¹

In light of this parallelism that Schauer posits, it is not surprising that he also considers England's continuing refusal to recognize privacy concerns "anomalous" in light of the country's long-standing recognition of defamation law.¹⁹²

At first blush, it is easy to draw a link between "privacy" in the sense recognized by the tort and "privacy" in reference to the realm in which we have said that women primarily function. (Of course, this is not to say that

¹⁸⁸ See, e.g., *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Sidis v. F-R Publishing Co.*, 113 F.2d 806 (2d Cir.), cert. denied, 311 U.S. 711 (1940).

¹⁸⁹ See Frederick Davis, *What Do We Mean by 'Right to Privacy'?*, 4 SOUTH DAKOTA L. REV. 1, 18, 20, 23 (1959), discussed in HIXSON, *PRIVACY IN A PUBLIC SOCIETY*, supra note 24, at ch. 2.

¹⁹⁰ Post, *Public Discourse*, supra note 23.

¹⁹¹ Schauer, *Social Foundations of Defamation*, supra note 3.

¹⁹² *Id.* at 18.

men, mostly functioning in the public sphere, do not have private dimensions to their lives--just as I have noted that most women have some public dimension to theirs.) While there is a connection between these two privacy "concepts," the matter cannot accurately be dealt with in such summary fashion, and it is discussed thoroughly in Chapter 5.

IX. GROUP DEFAMATION

Group defamation is most closely associated with the "identification" requirement of a defamation plaintiff's prima facie case. A plaintiff in an ordinary defamation suit must establish that he or she was identified as the person defamed, and this can be difficult if the objectionable publication refers to a group of people who allegedly engaged in the behavior or shared the characteristic that gave rise to the defamation.¹⁹³ For example, identification would be an issue if a statement said that most members of a given university's law faculty were engaging in illicit affairs with students. A professor from within the group would be able to succeed with a defamation action only if able to prove his or her identification as a member of the defamed group. If a group is quite large, this is a difficult if not impossible task.

However, group defamation issues also arise in a related way when a group is verbally attacked based on some characteristic--often an immutable one. These include race, gender, or ethnicity. In 1952, the U.S. Supreme Court in *Beauharnais v. Illinois*¹⁹⁴ upheld criminal libel

¹⁹³ See, e.g., *Saenz v. Playboy Enterprises, Inc.*, 653 F.Supp. 552, 229 (N.D.Ill. 1987); *Michigan United Conservation Clubs v. CBS News*, 485 F. Supp. 893, 897, 904, *aff'd*, 665 F.2d 110 (6th Cir. 1981); *Hanson v. Still*, 130 Ariz. 454, 636 P.2d 1236 (Ariz. App. 1981); see generally SMOLLA, DEFAMATION, *supra* note 2, at § 4.10; WATKINS, MASS MEDIA AND LAW, *supra* note 2, at 58-61; RESTATEMENT (SECOND), *supra* note 43 at § 564.

¹⁹⁴ 343 U.S. 250 (1952).

statutes aimed at those promulgating such group defamation. However, this case was decided prior to *New York Times'* conferral of special protection to certain defamatory publications, and while *Beauharnais* has never been expressly overruled, its continuing validity is highly suspect.

The import for women (as well as for other historically oppressed groups) of the recognition of group defamation is that such people are often defamed on the basis of some stereotype associated with the group. Just as racially hateful statements are frequently directed at a group generally rather than at an individual, sexually hateful verbal attacks are often directed at women as a group or at specific groups of women. As a practical matter, white middle-to-upper class males are the only group seldom defamed as part of a group; they benefit most from current defamation laws because they are the ones usually defamed as individuals, and they therefore enjoy a much greater possibility of effective legal recourse.

On a more theoretical level, some feminists would note that the individual focus of defamation law reflects the so-called possessive individualist philosophy of Western culture and legal systems.¹⁹⁵ As such, it runs counter to the feminist philosophy that promotes relational and communitarian values, values that might be advanced by fewer constitutional restrictions on group defamation law, as further discussed in Chapter 3 on Extremist Speech.

X. CONCLUSION

What inferences can be drawn about the values embodied in a legal system with a long history of protecting reputation, but with relatively few precedents for protecting a person from psychic injury caused by similar verbal at-

¹⁹⁵ This group of feminists are referred to as relational or cultural feminists in Chapter 2, *supra*, discussing feminist jurisprudence generally. See also generally JOEL HANDLER, *LAW AND THE SEARCH FOR COMMUNITY* (1990); MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW* ch. 7 (1990).

tacks? Why are we more concerned with the possibility that an individual will be shunned by others than that he (or she) might sustain socially debilitating emotional harm? The simple answer appears to be that the former type of harm impairs one's ability to compete in society's public sphere while the latter is a private type of injury with which the law has always been less concerned.

Women are assaulted, molested, and violated by so much in our English language -- misogynist labels like "cunt" and "bitch"¹⁹⁶ are all too common in our common parlance. The very real injuries inflicted by such words are usually outside the realm of defamation law for various reasons discussed above, most notably that they often are not intended to and do not harm reputation. Rather, these words are used to name call and, in so doing, inflict psychic and emotional injury.

The significance of defamation's failure to provide redress for the types of communicative harm women more often experience is lessened as other responsive causes of action gain legal recognition. This is increasingly the case as intentional infliction of emotional distress in particular has come into its own.

What inferences can be drawn about the bias of a tort law which features a rule drawing special attention to the chastity of a woman as if it were the most important thing to be said about her and indeed, at least implicitly, as if it were a matter appropriately within the public realm? Or about cases implying that a woman must be at some fault when she is the *victim* of a violent crime such as rape¹⁹⁷? Judges in these cases arguably exhibit a practical response

¹⁹⁶ See generally JANE MILLS, *WOMANWORDS* (1989). As Mills notes in her introduction, any term to denote the female "is likely to become pejorative, likely to acquire negative sexual connotations and, once it is attached to the female is unlikely to be transferrable to a male (unless to express contempt). *Id.* at x.

¹⁹⁷ See *Youssouppoff*, [1934] 50 TLR 581 discussed *supra* at notes 50-57 and accompanying text.

to wider societal biases, but they also reinforce the biases?

An inventory of the numbers and types of defamation cases brought by women serves as a further gender critique of defamation law, but, then, statistics about most areas of law reveal similar lack of impact on women's lives simply because the feminine remains so closely associated with the private. Without excusing patriarchal society's general exclusion of women from the public sphere and therefore from the protection of most of its laws, it seems that certain peculiarities about defamation law, including those recounted above, indicate a gendered bent that is, perhaps, more than incidental.

A Gendered Analysis of the Tort of Invasion of Privacy

I. INTRODUCTION

In light of the legal environment in which it arose, the twentieth century recognition and development of the privacy tort in the United States might be considered something of an anomaly. Western legal institutions, traditionally according little importance and even fewer protections to injuries of psychic or emotional consequence, have been primarily concerned with threats to property and physical security. Out of that legal context, however, an 1890 law review article by two influential Boston attorneys made a powerful plea for legal acknowledgment of a privacy tort,¹ and over the next three-quarters of a century, case law and commentary on the subject burgeoned, much of it eventually embracing the new cause of action.² Since roughly the mid-1960s, however, imposition of First Amendment doctrine on the invasion of privacy cause of action has signalled the demise of the privacy tort, at least in some of its aspects.³

Meanwhile, English attention to privacy issues has increased in very recent years. Still, a tort action arising from a generally acknowledged "privacy right" has not gained legal recognition. The Home Office report on "Privacy and Related Matters," the first Calcutt Report, was published in June 1990 and gave the press just 12

¹ Samuel Warren and Louis Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890) [hereinafter Warren & Brandeis]. For an interesting commentary on the socio-political backdrop of the article, see Anita L. Allen & Erin Mack, *How Privacy Got Its Gender*, 10 N.ILL.U.L REV. 441 (1990).

² See *infra* Sections III (A) and (B).

³ See *infra* Sect. V (A)(1); see also *infra* note 27.

months to get its house in order, lest legislative adoption of a privacy tort be reconsidered.⁴ Then, in January, 1993, a second Calcutt Report, the "Review of Press Self-Regulation", was published, recommending, among other things, that the government reconsider immediately enactment of a privacy tort. Finally, the government in 1995, while acknowledging the need for more effective press self-regulation, concluded that no criminal offence or civil remedy for infringement of privacy should be established.⁵ Meanwhile, the public express disgust and dismay over the excesses of the tabloid press while sales of such publications boom.

Although it has seldom been analyzed in a gendered light, the rise and fall of the privacy tort in U.S. jurisprudence and the concept's fate in England, currently at the hands of the Press Complaints Commission, may reveal gendered trends. It is a historical fact that in Western society men have traditionally operated in the public (market) sphere of society, owning property and engaging in commercial transactions, while women have more often labored in the home (private, domestic sphere), bearing primary (and sometimes sole) responsibility for child rearing and the maintenance of emotional well-being and human relationships. This was especially true among certain classes, and more so in the pre-industrial era than in post-industrial times.⁶ In such a society, laws protec-

⁴ See generally REPORT OF THE COMMITTEE ON PRIVACY AND RELATED MATTERS Cmnd. 1102 (1990) [hereinafter Calcutt I Report].

⁵ See House of Commons Debate, Vol. 263, col. 1323, 17 July 1995, noted in 1995 PUBLIC LAW 645. This debate came in response to the report of the National Heritage Select Committee on Privacy and Media Intrusion. 16 March 1993.

⁶ See *How Privacy Got its Gender*, supra note 1, at 445-53. As the authors observe, the nineteenth century ideology of "true womanhood" and the "cult of domesticity" prevailed to confine women to the private household, usually as caretakers. Thus, certain classes of women enjoyed considerable privacy in the sense of social isola-

tive of property rights and the market-place naturally inured to the benefit of men. Women, on the other hand, operating primarily as care givers in the private sphere were, along with their unique concerns, largely ignored by the law except when it incidentally (or by design) denied them rights.

Viewed this way, the relatively recent recognition of the tort of privacy seems all the more remarkable. For the early proponents of privacy did not create a legal fiction that would make the cause of action more palatable to the legal establishment.⁷ Warren and Brandeis spoke quite frankly and simply of invasion of privacy as a legal *injuria*, meaning "an intentional and illegal violation of honour, i.e., the whole personality of another."⁸ And, in many instances, the tort of privacy gained its early

tion. Still, these women enjoyed little "decisional privacy", that is, legal autonomy in matters of sexuality, marriage, and the family. *Id.* at 446.

⁷ Some would take issue with this and although I would not concede that they created a "legal fiction" Warren and Brandeis did construct some interesting analogies and arguments to support their proposed privacy tort. For instance, they spoke of the right to property as including both tangible and intangible property. Warren & Brandeis, *supra* note 1, at 193. They cited as examples of legal recognition of "intangible" harms the law of nuisance, slander and libel, and alienation of affection. *Id.* at 194. They also mentioned the then-budding law of fright, contrasting its intangible elements with those of the established law of assault. *Id.* at 197 n.1. Still, their focus was on the spiritual injury caused by invasions of privacy, and they admitted it was distinct from any tangible harm. *Id.* at 197.

Indeed, at several points in the article, Warren and Brandeis criticized the legal fictions developed by various courts in order to recognize and provide redress for a privacy-type injury. *Id.* at 205 (discussing fiction of property right in one's intellectual or artistic creations), 211 (discussing implied contract and breach of confidence as theories used to provide remedy when private facts were published by another).

⁸ *Id.* at 198 and n.1 (citing SALKOWSKI, ROMAN LAW 668), 213. Such a legal *injuria* has also been explained as "an injury in itself", as by its very doing. Bloustein, *Reply to Prosser*, *infra* note 13, at 967-68.

recognition based on precisely that: an effort to protect an individual's human dignity, self worth, and feelings.⁹

While privacy law is not gender specific *per se*, its sometimes unique import for women is not difficult to discern. In a culture that long devalued women's supposedly extreme sensitivities, here was a legal recognition and remedy for injured feelings, for abuse of self-dignity. The tort seemed to recognize the very type of injury to which women were presumably more sensitive and vulnerable. Inherent in that recognition, however, may also have been a condescension to women and a commentary on their proper role. The late nineteenth century assumption that women should be confined to domestic roles had the side-effect of deeming them creatures of extraordinary modesty, and a close look at early privacy cases bears witness to this underlying function of the tort.¹⁰

As the following analysis reveals, a feminist critique of privacy tends to disprove the tort's alignment with feminist goals and thinking. First, as already noted, a

⁹ See, e.g., *Melvin v. Reid*, 297 P. 91 (Cal. 1931); *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905).

As discussed below, many later cases tied recognition of the various branches of the privacy tort to property rights, reputation injuries, etc. See *infra* Sect. III (A) (discussing false light and appropriation types of privacy). See, e.g., *Barber v. Time, Inc.*, 159 S.W.2d 291, 293 (Mo. 1942) (recognizing that interest protected is similar to that of reputation).

¹⁰ See, e.g., *Meetze v. Associated Press*, 95 S.E.2d 606 (S.C.1956) (report that plaintiff, twelve-year-old, had given birth); *Melvin v. Reid*, 112 Cal. App. 285 (1931) (former prostitute, now "reformed" was subject of a film about her, using her true identity); *Roberson v. Rochester Folding-Box Co.*, 64 N.E. 442 (N.Y. 1902) (girl's likeness used by defendant to advertise product); *DeMay v. Roberts*, 46 Mich. 160, 9 N.W. 146 (1881) (defendant was unwanted spectator at birth of plaintiff's child).

See generally *How Privacy Got Its Gender*, *supra* note 1, at 453-55, 459-65. As Allen and Mack observe in their article, "[w]omen appear in the Warren and Brandeis article as seduced wives and daughters" in need of paternalistic protection. *Id.* at 459.

good case can be made that from its late nineteenth century inception, the privacy tort--as a product of the masculine hegemony--was calculated to maintain the gender role *status quo*. Second, more recent cases applying the various privacy principles and rules show decreasing sympathy and respect for women's desire to keep aspects of their lives--particularly as related to their sexuality--from becoming public knowledge. These cases often run counter to those featuring similar facts but that favor male plaintiffs.¹¹ This is not to suggest that the outcome of any given case may be predicted conclusively by the gender of the plaintiff and the nature of the disclosure. Cases do, however, evince seemingly unpredictable shifts about what is private and what is not, especially with regard to women. Finally, on a theoretical level, the privacy tort, which may be seen as fostering individualism rather than collective good, may be viewed as traditional and masculine in character. Perhaps cultural and intellectual shifts contemporaneous with the rise and fall of privacy law can also help substantiate its gendered nature.

If gendered thinking, though unacknowledged, has influenced the development of American privacy law, what then of the tort's demise in the constitutional and common law jurisprudence of the past three decades? Whether focusing on the feminine or masculine aspects of the privacy tort, if the law for a time recognized these values, why is judicial regard waning?¹² Can (or should)

¹¹ As discussed below in relation to *Cape Publications* and *K.T.V.B.*, *infra* notes 156-64 and accompanying text, and in relation to *Hawkins* and *Meetze*, *infra* notes 229-43 and accompanying text, the courts seem more squeamish about revelations related to male sexuality than to those regarding female sexuality.

¹² Even Justice White wrote in a 1989 case, *Florida Star v. B.J.F.*, that "after a brief period early in this century where Brandeis' view was ascendant--the trend in 'modern' jurisprudence has been to eclipse an individual's right to maintain private any truthful information that the press wished to publish. . . . Today we hit the bottom of the slippery slope." 491 U.S. 524, 553 (1989) (White, J.,

anything be done to preserve the tort? Do we want to refine its sensitivity to concerns that might be considered uniquely feminine? Or would we like to see the privacy tort interpreted in a more gender neutral manner? Are there any lessons from the experience that might be used to the benefit of a developing English jurisprudence? Before considering these more specifically legal matters, it is useful to consider the philosophies supporting recognition of the legal concept of privacy.

II. THE PHILOSOPHY OF PRIVACY

In Western legal systems privacy is widely regarded as a cultural norm which has come to influence various legal analyses and issues. Many consider that it was part of the "living law" of Western society long before it gained formal legal recognition.¹³ Professor Milton Konvitz has

dissenting; citing *Time, Inc. v. Hill*, 385 U.S. 374 (1967)).

¹³ See, e.g., *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (describing privacy as a right that is "comprehensive [and] most valued by civilized man) (emphasis added); Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L.L.REV. 233, 234 (1977) (speaking of privacy's invasive history in "the American consciousness, in American culture, and in American institutions"; also speaking throughout the article of the intuition aspect of privacy); Edward Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Prosser*, 39 N.Y.U.L.REV. 962, 971 (1964) [hereinafter Bloustein, *Answer to Prosser*] (noting that the Western ethico-religious tradition posits an individual's independence of will, dignity, and integrity); Harry Kalven, Jr., *Privacy in Tort Law--Were Warren and Brandeis Wrong?* 31 LAW & CONTEMP. PROBLEMS 326, 326 (1966) [Kalven, *Were Warren & Brandeis Wrong?*] (commenting that "[p]rivacy is one of the truly profound values for a civilized society"); Warren & Brandeis, *supra* note 1, at 195 (calling the development of privacy law "inevitable" because it has been made clear to men that only "part of the pain, pleasure, and profit of life lay in physical things . . . [t]houghts, emotions, and sensations demanded legal recognition"), 198 (noting that redress for such an injury resulting from "contumely and insult" and unwarranted violation of the "'honor' of another" existed even in Roman civilization).

stated a succinct history of the philosophy of privacy. Philosophers back to Socrates have toyed with notions of the "inner man" as distinct from his outer being.¹⁴ Subsequently, Stoic philosophers identified inner man according to his thoughts, that is, those that were "under [his] control."¹⁵ Many centuries later, Locke spoke of privacy as a natural right, embracing the tradition preceding him that man is more than flesh and bones; he has a property interest in the products of his labour as much as in his own person.¹⁶ This logic was carried perhaps to its ultimate by Ralph Waldo Emerson who wrote, "Person makes event, and event person."¹⁷ As Konvitz has summarized from these principles,

There can be no fixed inventory of the things, acts, and values that pertain to the inner man and those that pertain to the outer man; for inner and outer, like soul and body, are terms that describe living processes.¹⁸

See generally Milton R. Konvitz, *Privacy and the Law: A Philosophical Prelude*, 31 LAW & CONTEMP. PROBLEMS 272 (1966) [hereinafter Konvitz, *Philosophical Prelude*] (discussing conceptions of privacy back to Biblical times, then up through Socrates, Locke, and Emerson).

Cf. Glenn Negley, *Philosophical Views on the Value of Privacy*, 31 LAW & CONTEMP. PROBLEMS 319 (1966) [hereinafter Negley, *Philosophical Views*].

¹⁴ Konvitz, *Philosophical Prelude*, *supra* at 273 (discussing 2 THE DIALOGUES OF PLATO 282 (Jowett Transl. 1937)).

¹⁵ *Id.* at 273-74 (discussing I. EPICLETUS, THE DISCOURSES 7 (Oldfather transl. 1925)).

¹⁶ *Id.* at 275 (discussing JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT 129-31 (Everyman's Library, 1924)).

¹⁷ *Id.* (discussing RALPH WALDO EMERSON, *Essay on Fate*, in THE CONDUCT OF LIFE 42 (1899)).

¹⁸ Konvitz, *Philosophical Prelude*, *supra* note 13, at 278. Konvitz has argued that the characterization of constitutional guarantees as "emanation," "penumbras," "zones," or "facets" of privacy is consistent with this view of the nature of man. *Id.* at 276.

Accordingly, acts carried out in "public" places may be "private" in character, and vice versa. The "right to be let alone" may be exercised in a public setting as well as in a private one.

Another privacy philosopher, Tom Gerety, would take issue with this assertion, arguing that if the privacy right is to be meaningful and useful, it must be redefined, including a strict delineation between the "public" and the "private".¹⁹ Gerety attacks the intuitive foundation of privacy which has allowed the concept to become so unwieldy that it is largely useless when we need to apply it in specific legal contexts. Gerety, grappling for useful definitions which will confine privacy and make it manageable, proposes limitations he labels autonomy, identity, and intimacy.²⁰ Gerety considers an aspect of physical intrusion to be crucial to stating a manageable concept;²¹ additionally, control over the body, as the "most basic vehicle of selfhood" is similarly critical.²² Because one's thoughts and intimate secrets fall without both these categories, they are protected as private only if they remain private in the sense that they are unshared with the public,²³ for example, not part of any public records.²⁴

¹⁹ Gerety, *Redefining Privacy*, *supra* note 13, at 291 (drawing a strict distinction between "public" and "private").

²⁰ *Id.* at 236.

²¹ *Id.* at 265.

²² *Id.* at 266.

²³ Gerety argues for the validity of a distinction between gossip and publication to the masses. Gerety, *Redefining Privacy*, *supra* note 13, at 282-88.

²⁴ *Id.* at 281-91.

Professor Richard Hixson views privacy as stemming from an individualist concept of society,²⁵ and he considers that it is, to an extent, a peculiarly American phenomenon. While Hixson notes that individuals often perceive their own right to privacy as "God-given", conferred by natural law,²⁶ he disagrees that it is a Lockean-type natural right. His conclusion is based on his belief that the right is not one which the individual retains as against the state, but rather that, if the right exists at all, it is one bestowed by others.²⁷

²⁵ RICHARD HIXSON, *PRIVACY IN A PUBLIC SOCIETY* ch. 6 (1987) [hereinafter HIXSON]. See also Gerety, *Redefining Privacy*, *supra* note 13, at 234.

Others would not see it as so "Americentric". Prof. Konvitz, for example, has traced the idea of privacy all the way back to the Old Testament of the Bible, noting that Adam and Eve felt shame at the knowledge of their nakedness after they ate of the fruit of the tree of knowledge. Konvitz, *Philosophical Prelude*, *supra* note 13, at 272 (citing *Genesis* 3:7). Konvitz states in an abbreviated form the very long-standing history of [our] preoccupation with zones of privacy. Even Hixson, elsewhere in his book, discusses privacy's roots in the Garden of Eden. HIXSON, *PRIVACY*, *supra* at 3-5.

²⁶ This idea is supported by several of the early privacy cases, including *Pavesich v. New England Life Ins. Co.* 122 Ga. 190, 50 S.E. 68 (1905). In *Pavesich* the court wrote that this natural right should be recognized by legislation, that it was an endowed human faculty, "subject only to such restraints as are necessary for the common welfare." 50 S.E. at 71, *discussed in* *Barber v. Time, Inc.*, 159 S.W.2d 291, 294 (Mo. App. 1942) and in *Bloustein, Answer to Prosser*, *supra* note 13, at 986.

²⁷ See generally HIXSON, *PRIVACY*, *supra* note 25. Hixson's argument is supported by Diane Zimmerman, who has also criticized Warren & Brandeis' article and its jurisprudential progeny. She writes that "[s]ome human problems are impervious to legal solution because they involve social ideals that do not readily translate into intelligible legal theory." Diane Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis Privacy Tort*, 68 CORNELL L. REV. 291, 365 (1983). See also Gerety, *Redefining Privacy*, *supra* note 13, at 238 (asserting that privacy cannot be "ubiquitous"; that "laws cannot enforce all our values to their logical limits"). Cf. A. WESTIN, *PRIVACY AND FREEDOM*, 7 (1977) ("privacy is the voluntary and temporary withdrawal of a person from the general society"); S. LUKES,

If there is a uniquely American conception of privacy, it has certainly been influenced by a long-standing English endorsement of an important, if somewhat vague, privacy doctrine. William Blackstone wrote in his *Commentaries* that a man's home is his castle, and one statute, dating to the 14th century provides that eavesdroppers are "punishable by finding sureties for their good behaviour."²⁸ However, English courts and the British Parliament have not been quick to take up the torch of privacy in any meaningful way. As a result, acts ranging from use of surreptitious surveillance devices to intrusive news-gathering techniques to the publication of private information are left unprohibited, and the injuries they cause remain largely unredressed. Within the past two decades, two different Home Office committees have considered privacy issues in Britain,²⁹ an indication of the attention the matter has received of late. The latter of those committees issued a follow-up report in January, 1993,³⁰ as the clamor over invasive reporting was rekindled by reports on the Waleses' marriage, the Duchess of York's holiday frolics, and public officials' sexual misconduct.³¹ Meanwhile, the Press Complaints Commission continues to flesh out what is and is not permissible with regard to privacy under its Code of Practice.

INDIVIDUALISM 66 (1973) (privacy is achieved either by the individual's withdrawal or by the "public's" forbearance).

²⁸ GEOFFREY ROBERTSON, *FREEDOM, THE INDIVIDUAL AND THE LAW*, 95 (6th ed. 1989) (quoting a 1360 statute).

²⁹ REPORT OF THE COMMITTEE ON PRIVACY AND RELATED MATTERS Cmnd. 1102 (1990) [hereinafter CALCUTT I REPORT]; REPORT OF THE COMMITTEE ON PRIVACY Cmnd. 5012 (1972) [hereinafter YOUNGER REPORT]; see also Sir Louis Blom-Cooper, QC and Lisa R. Pruitt, *Privacy Jurisprudence of the Press Complaints Commission*, 1994 *ANGLO-AM. L. REV.* 133.

³⁰ REVIEW OF PRESS SELF-REGULATION Cmnd. 2135 (1993) [hereinafter CALCUTT II].

³¹ See *id.* at ¶¶ 4.41-.55.

Having looked at the nebulous concept of privacy that has been long acknowledged as a cultural force, if not always as a legal concept, in both the United States and in England, it is helpful next to consider further the evolution of the privacy concept's boundaries in various legal contexts, with a particular focus on the arena of tort. This exercise will provide initial indications of some of the gender issues associated with a privacy right.

III. THE LEGAL CONCEPTION OF PRIVACY

Privacy as a U.S. constitutional concept was initially discussed as early as 1886, recognizing the harm incurred from governmental invasion of an individual's "indefensible right of personal security, personal liberty, and private property" ³² In a series of cases over the century since, the Supreme Court has further defined this privacy right, seeing it as justification to prohibit electronic eavesdropping on a telephone conversation, ³³ to allow possession of pornography in one's home, ³⁴ to protect the right of married couples to use contraceptives, ³⁵ and to protect a woman's right to choose abortion. ³⁶ Various Justices have identified the constitutional source of privacy as associated with the First, Third, and Fifth Amendments, or as derived from the Ninth or the Fourteenth only. ³⁷ Whatever the source, privacy has become a comprehensive constitutional concept, one invoked in any number of contexts to establish a zone into which the government cannot intrude. As one commentator has written, at times

³² Boyd v. United States, 116 U.S. 616, 630 (1886).

³³ United States v. Katz, 389 U.S. 347 (1967).

³⁴ 394 U.S. 557 (1969).

³⁵ 367 U.S. 497 (1961).

³⁶ Roe v. Wade, 410 U.S. 113 (1973).

³⁷ See, e.g., Griswold v. Connecticut, 381 U.S. 479, 509-10 (1965) (Black, J., dissenting).

privacy has taken on a "protean capacity to be all things to all lawyers."³⁸

A. *A Brief History of the Privacy Tort*

When Warren and Brandeis wrote their influential article in 1890, they linked their new-found concern with privacy to technological changes that were facilitating invasions of privacy, as well as to an increasingly powerful mass-circulation media which seemed preoccupied with sensationalist stories.³⁹ They identified a correlation between an advancing civilization and the increasing need for privacy.⁴⁰ In perhaps the most emotive passage of the article, they wrote:

To satisfy a prurient taste the details of sexual relations are spread broadsheet in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and

³⁸ Gerety, *Redefining Privacy*, *supra* note 13, at 234. "The problem with the right to privacy is not its uncertainty or invalidity generally but its lack of specific identity in the foreground of legal rights and remedies, particularly under the Constitution." *Id.* at 244.

³⁹ Warren & Brandeis, *supra* note 1, at 195-96.

⁴⁰ This point is somewhat supported by Richard Posner who notes that the greater public demand for information about the private lives of the affluent and powerful is motivated by our desire to know more of them because they are our heroes and we desire to emulate them. On the other hand, he writes, poor people seldom have their privacy invaded because people are not interested to hear about the details of their uninspiring lives. Richard Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 396 (1978) [hereinafter Posner]. This is also somewhat consistent with the fact that primitive cultures were less concerned about privacy because, essentially, they had no choice. See also Gerety, *Redefining Privacy*, *supra* note 13.

invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.⁴¹

It is interesting to note that the primary motivation for the authors' advocacy for the tort seems to be Warren's own encounters with the Boston gossip columnists of the late nineteenth century. In 1883 Warren had married Mabel Bayard, the daughter of a U.S. Senator, and they had set up housekeeping in an exclusive Boston neighborhood, entertaining frequently and elaborately. They were dogged by the *Saturday Evening Gazette* which reported their activities, along with those of other Boston "blue bloods," in lurid detail.⁴² Warren's annoyance, which peaked at the coverage of his daughter's wedding, prompted the landmark article.

The resultant legal injury arising from this annoyance was varyingly characterized by Warren and Brandeis as "distress" and "mental pain."⁴³ However, these were arguably only descriptions of the resulting harm, not of the actual gravamen of the tort, because Warren and Brandeis themselves acknowledged that the law provides no compensation for "mere injury to the feelings."⁴⁴ They implied that the gravamen of the proposed tort was actually an insult to one's honour, to his or her whole personality.⁴⁵

⁴¹ Warren & Brandeis, *supra* note 1, at 196.

⁴² ALPHEUS MASON, *BRANDEIS: A FREE MAN'S LIFE* 70 (1960).

⁴³ Warren & Brandeis, *supra* note 1, at 196.

⁴⁴ *Id.* at 197. They clarified that injury of feelings may be an element of damages in some torts, but it is not a free-standing legal injury. *Id.* at 197 & n.1.

⁴⁵ *Id.* at 198 & n.1. See also text accompanying notes 7-8 *supra*. The gravamen of the tort has been the topic of a great deal of discussion, and many have admitted their inability to comprehend precisely the wrong that is purportedly redressed. See, e.g., Gerety, *Redefining Privacy*, *supra* note 13, at 237-39 (discussing lack of legal or conceptual definitions and attempting to formulate one);

They pegged this notion as the foundation for various then-recognized common law rights, including those to artistic and intellectual property,⁴⁶ but argued that it was much broader than had been expressly recognized. They elaborated on this underlying right as one that they argued the common law already acknowledged: "each individual['s] right of determining, ordinarily, to what extent his [or her] thoughts, sentiments, and emotions shall be communicated to others."⁴⁷

The Warren & Brandeis article cited Judge Cooley's then-recent treatise on torts for the proposition that man has a right "to be let alone."⁴⁸ Commentators have since posited that "privacy" is not synonymous with a "right to be let alone"⁴⁹, although Warren and Brandeis seemed implicitly to assume the contrary. The commentators' point is that the latter is a more comprehensive right, making "private," and therefore protected, not only what is behind

Kalven, *Privacy in Tort Law*, *supra* note 13, at 334 (discussing the lack of interest in knowing the underlying basis of tort liability), 340 ("Conceptually I am not sure I see what the invasion of privacy consists of."); Posner, *The Right to Privacy*, *supra* note 40, at 393 ("the concept of 'privacy' is elusive and ill-defined").

⁴⁶ *Id.* at 197-98.

⁴⁷ *Id.* at 198 & n. 2 (quoting *Millar v. Taylor*, 4 Burr. 2303, 2379 (1769), Yates, J., "[E]very man has a right to keep his own sentiments, if he pleases. He has certainly a right to judge whether he will make them public, or commit them only to the sight of his friends.") A similar definition of privacy was stated by Richard Parker, "Privacy is control over when and by whom the various parts of us can be sensed by others." Richard Parker, *A Definition of Privacy*, 27 RUT. L. REV. 275, 276-77 (1974).

⁴⁸ *Id.* at 195 & n. 4 (citing COOLEY ON TORTS (2d ed. 1888)). Other suggested titles for the concept are "human dignity", "dignity of the individual", and "rights of personality." William Beaney, *The Right to Privacy and American Law*, 31 LAW & CONTEMP. PROBLEMS 252, 254 (1966) [hereinafter Beaney, *Privacy and American Law*].

⁴⁹ See, e.g., HIXSON, *PRIVACY*, *supra* note 25, at ch. 3; Konvitz, *Philosophical Prelude*, *supra* note 13, at 279.

closed doors, but also what happens in public when the act is by an individual expressing his or her "personality": his or her inclinations, thoughts, emotions.⁵⁰

Though a number of scholars have grappled with precisely what name should be given the tort, most have realized by now that labelling is not the key to understanding the tort, nor to delineating its appropriate boundaries.⁵¹ The balances struck by various courts that have decided claims brought under the rubric of a privacy tort are the most telling indication of what privacy means. Those decisions also reveal its relative importance to other legal values. The soci-political context is all important. As one commentator wrote in the 1960s,

The right is an affirmation of the importance of certain aspects of the individual person and his [or her] desired freedom from unreasonable intrusive conduct by others. The substance of the right as it has emerged over time is most clearly seen as a result of a series of favorable responses to claims arising out of conflict-engendered situations in the real world.⁵²

⁵⁰ Examples cited by Konvitz included dressing in an unorthodox way or loafing in a public park. Konvitz, *Philosophical Prelude*, *supra* note 13, at 279 (citing *People v. O'Gorman*, 274 N.Y. 284, 8 N.E.2d 862 (1937); *Territory of Hawaii v. Anduha*, 48 F.2d 171 (9th Cir. 1931)). Cf. Posner, *The Right of Privacy*, *supra* note 40 (arguing that the privacy right is only about concealing information regarding oneself); Gerety, *Redefining Privacy*, *supra* note 13 (stating a stricter correlation between privacy tort and that which is physically or literally private, in terms of both body and soul).

⁵¹ Labelling issues are often also important to feminists, many of whom like to avoid labels because they can be divisive and can cause ideas to "become fixed instead of remaining fluid and growing." Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 5 n. 5 (1988).

⁵² Beaney, *Privacy and American Law*, *supra* note 48, at 254. See also Negley, *Philosophical Views of Privacy*, *supra* note 13, at 318 ("The claim that privacy is a right to be protected by law is, therefore, a question of value discrimination, and the justification of privacy in this context is a problem of moral definition and analysis.").

At the time of that comment, the tort of privacy was riding high, perhaps even enjoying peak recognition and deference by courts and commentators. Shortly thereafter, however, the tide began to turn, and, as discussed below, interests other than self-dignity began to be accorded greater weight in these all-important balances. It is in these balances, struck in various cases throughout the rise and fall of the privacy tort, that the gendered nature of privacy is revealed. If at one point the wrong of privacy invasion--as an affront to human dignity--was elevated to a legal right, what social and political factors have contributed to its fall from judicial and constitutional grace?

B. The Tort of Privacy in the United States.

The tort of privacy has been developing in the United States for more than 100 years, while Britain has yet to recognize any such tort legislatively or judicially. As noted previously, the privacy tort recognized under U.S. law is largely a creature of the twentieth century, the primary impetus for it being Warren & Brandeis's 1890 law review article.⁵³ Although the judiciary initially resisted conferring a legal remedy on those who had suffered the sort of purely psychic injury caused by an invasion of privacy, virtually all jurisdictions had recognized some form of privacy action by the middle of this century.

Constitutional implications have also arisen in relation to the "privacy" tort. In particular, First Amendment implications arise whenever the media stands to be sanctioned in any way, and the privacy context is no

⁵³ See *supra* Sect. III (A).

exception. Tests of "newsworthiness"⁵⁴ and public figure status are among those employed.

Over the years, four different manifestations of the privacy tort have gained general judicial (and in some cases legislative) recognition. These are intrusion, public disclosure of private or embarrassing facts, portraying a person in a false light, and appropriation of an individual's name or likeness for commercial purposes.⁵⁵

⁵⁴ See, e.g., *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (commercial appropriation; whether broadcasting a stunt entertainer's entire act was an appropriation); *Ann-Margaret v. High Society Magazine, Inc.*, 498 F.Supp 401 (S.D.N.Y. 1980) (newsworthiness has a broad definition, including matters of entertainment and amusement); *Current Audio, Inc. v. RCA Corp.*, 337 N.Y.S.2d 949 (Sup. Ct. 1972) (excerpting large portion of an Elvis Presley press conference, orchestrated by his record company plaintiff RCA, was newsworthy and therefore no liability was incurred).

For commentary on the newsworthiness test, see Edward Bloustein, *Privacy, Tort Law, and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?*, 46 TEX. L. REV. 611, 622-23 (1968) (commenting that if "newsworthy" is identical to what the media publish the tort is worth little); Marc Franklin, *A Constitutional Problem in Privacy Protection: Legal Inhibitions on Reporting of Fact*, 16 STAN. L. REV. 107, 113-21 (1963); Marshall Shapo, *Media Injuries to Personality: An Essay on Legal Regulation of Public Communication*, 46 TEX. L. REV. 650, 658-61 (1968).

⁵⁵ See generally William L. Prosser, *Privacy*, 48 CAL.L.REV. 383 (1960). While Prosser's categorization has been highly influential and has "stuck" judicially, it was not without criticism. Professor Edward Bloustein wrote an excellent article in 1964, in response to Dean Prosser. He made a cogent argument that the four categories articulated by Dean Prosser were, at most, different manifestations of injury to the same one basic human dignity right which had been described by Warren & Brandeis. They were not four different injuries nor four different torts; rather they were different, but still related, ways in which an individual's human dignity could incur injury. See generally Bloustein, *Answer to Prosser*, *supra* note 13.

Although courts have generally embraced Prosser's four categories and ignored Bloustein's comments, inasmuch as Bloustein argues that Warren & Brandeis contemplated only a *single tort*, with the sole gist being injury to human dignity and self esteem, I find him very convincing. This common theme of harm to self-dignity is more obvious in the

As previously discussed, such divisions of the privacy tort proposed by Warren & Brandeis don't seem to have been contemplated by them.⁵⁶ Still, Dean Prosser's 1960 article espousing the categories had great impact upon the evolving common law, and the categorization soon enjoyed widespread usage, which continues today. From the perspective of seeking to construct a gendered critique of privacy, these categories are not particularly helpful. In fact, Prosser's categories may be seen as one of the first indications that privacy was straying from what might be viewed as a "feminine" concern with self esteem and dignity, as previously indicated in Warren and Brandeis's article and in early cases. Still, because of their predominance in U.S. case law, much of the following discussion is based on them.

C. *English Privacy Law.*

England has not developed comprehensive privacy law doctrines in any context, and the media law setting is no

earlier cases, where even the matters that would not be categorized as appropriation cases focused not on economic injury, but rather on the wound to self-esteem, to one's "personality." See, e.g., *Melvin v. Reid*, 297 P. 91 (Cal. App. 1931).

Another commentator has opined that not all tort cases fall within one concept of privacy. Professor Gerety identifies three distinct rationales for tort recovery in so-called privacy cases, only one of which is actually privacy. The other two he considers more akin to misappropriation and defamation. Gerety, *Redefining Privacy*, *supra* note 13, at 246. I agree with Prof. Gerety to the extent he purports to describe the past few decades of privacy jurisprudence. As I have already noted, early cases tended to analyze even appropriation and intrusion cases with a focus on harm to human dignity. More recently, however, the cases have diverged from publication of private facts cases and feature analysis more closely akin to other torts.

⁵⁶ See generally Bloustein, *Response to Prosser*, *supra* note 13.

exception.⁵⁷ Prevailing is the general legal principle that whatever is not expressly prohibited is permitted.⁵⁸ No privacy tort has yet been recognized judicially or legislatively, though occasionally nuisance, defamation, or another slightly overlapping tort provides the aggrieved party with an avenue of legal redress. In a few cases, injunctions have been issued to prevent publication of sensitive or confidential information, the successful plaintiffs usually being those who convince the court that the material is not of public importance or that it was obtained illegally.⁵⁹ Royal lineage also seems to help. The Prince of Wales successfully enjoined publication of recordings of his pre-nuptial phone conversations with then-Lady Diana Spencer,⁶⁰ but John Lennon⁶¹ and Tom

⁵⁷ For commentary and conflicting views see A. Goodman, *The Law of Defamation and Freedom of Speech*, 13 CURRENT LEGAL PROBLEMS 135, 145-46 (1960); Brian Neill, *The Protection of Privacy*, 25 MODERN L. REV. 393 (1962); Percy Winfield, *Privacy*, 47 L.Q. REV. 23 (1931) (proposing definition for invasion of privacy as "unauthorized interference with a person's seclusion of himself or of his property from the public").

⁵⁸ Baron Bernstein of Leigh v. Skyways [1978] QB 479.

⁵⁹ See, e.g., *Francome v. Mirror Group Newspapers* (1984), 2 ALL E.R. 408, noted in ROBERTSON, FREEDOM, INDIVIDUAL, *supra* note 28, at 99.

⁶⁰ ROBERTSON, FREEDOM, INDIVIDUAL, *supra* note 28, at 98 (also noting a case involving the Duke and Duchess of Argyll, in which the latter was able to stop her husband from publishing details of their marriage).

A similar sensitivity to the Royals might be observed in adjudications of the Press Complaints Commission. See Press Complaints Commission, *Report No. 25 7-9* (May-July 1994). A spate of adjudications about a photo -- published in several national newspapers -- of Prince Edward kissing his girl-friend, Sophie Rhys-Jones, determined the photo to be in violation of the Code of Practice. When the photo was taken, the two were standing about ten feet from a house on the Queen's estate at Balmoral. The photo had been taken with a long-lens camera by someone who presumably was not on the private estate property. The adjudications were consistent with PCC precedents and with the language of the code itself. No mention was made of the royalty issue in the rationale of the adjudications except

Jones⁶² have been among those unable to suppress publication of details of their domestic confidences.

Two Home Office committees on privacy have, in the past 25 years, made various recommendations for the adoption of criminal laws in England and Wales against intrusive actions.⁶³ The former, the Younger Committee, endorsed the statutory prohibition on identifying rape victims in England and Wales, and the latter, the Calcutt Committee, recommended that the prohibition be extended to all victims of sexual assaults.⁶⁴ Still, in spite of both

in one, where the Commission denied that it was in the public interest to inform the public of the serious nature of the Prince's relationship. This seems to me a questionable call given the Royal family's arguable importance in British life and governance. See also *infra* note 73 (discussing Princess Eugenie case and others). But see Press Complaints Commission, Report No. 29, 6, 9-11 (March-Apr. 1995) (finding published report that Princess Diana's sister-in-law, Countess Spencer, was being treated at a clinic for an eating disorder, was in violation of Clause 4 of the Code. Furthermore, it was not justified as being in the "public interest." Another newspaper that merely made inquiries regarding the Countess's presence at the clinic but which had published no story was found not to have violated the Code).

⁶¹ Lennon v. News Group [1978] F.S.R. 573.

⁶² Woodward v. Hutchins [1977], 1 W.L.R. 760.

⁶³ For example, the first Calcutt Committee recommended that the following should be criminalized: (a) entering private property without consent with an intent to obtain and publish personal information; (b) placing a surveillance device on private property with intent to obtain and publish personal information; and (c) taking a photograph or recording the voice of one on private property with a view to publication and accompanying identification of the person. CALCUTT I REPORT, *supra* note 29, at ix, and ¶ 6.33 at 23. The second report reiterated the recommendation, while proposing minor modifications. CALCUTT II, *supra* note 30, at xii, ¶¶ 7.1-.32.

⁶⁴ CALCUTT I REPORT, *supra* note 29, at ¶ 10.13. This was eventually done. See *infra* Sect. V(A)(3)(b).

committees' expressed offense at tabloid press tactics,⁶⁵ neither committee went as far as to recommend that a privacy tort be statutorily adopted--at least not immediately.⁶⁶ Then, in 1993, the second Calcutt Report determined that the time for such a statutory action has come, urging the government to reconsider adoption of a privacy statute.⁶⁷ The government in 1995 expressly rejected that recommendation, while at the same time endorsing a more explicit privacy article in the industry's code of practice and the payment of compensation to those whose privacy complaints are upheld by the Press Complaints Commission.⁶⁸

The first Calcutt Report was not terribly influential, as the British government failed to adopt its recommendations regarding criminal actions for certain physical invasions of privacy and the Press Complaints Commissions drafted its own Code of Practice rather than adopting the one proposed in *Calcutt I*. The report acknowledged the grave need for press recognition of individual privacy and gave the newspaper industry one year to get its own house in order lest it face legislation. Additionally, Calcutt suggested replacement of the long-standing, newspaper-funded, press watchdog, the Press Council, with a new, leaner and more single-minded one, the Press Complaints Commission.⁶⁹ *Calcutt II*, following up in 1993, concluded however, that press self-regulation under the PCC was failing and recommended formation of a press-regulatory body with statutory powers.⁷⁰

⁶⁵ This was especially so with the first Calcutt Report. See generally CALCUTT I REPORT, *supra* note 29, at ch. 4.

⁶⁶ CALCUTT I REPORT, *supra* note 29, ¶ 12.5 at 46; YOUNGER REPORT, *supra* note 29.

⁶⁷ CALCUTT II, *supra* note 30, at xiii, ¶¶ 7.35-.42.

⁶⁸ See *supra* note 5 and accompanying text.

⁶⁹ CALCUTT I, *supra* note 29, at chs. 14-15.

⁷⁰ CALCUTT II, *supra* note 30, at ch. 6.

The Press Council, formed in 1953 as the original press self-regulatory body,⁷¹ had decided complaints based largely on its own precedent. From that precedent, it eventually drafted a Code of Practice. In 1976 it had issued a Declaration of Principle on the topic of privacy, stating, in relevant part:

The publication of information about the private lives or concerns of individuals without their consent is only acceptable if there is a *legitimate public interest* overriding the right of privacy . . . The public interest must be a legitimate and proper public interest and not only a prurient or morbid curiosity.⁷²

The Press Council was frequently unable to make its rulings stick because, as a private body, it had no powers to award damages or to enforce standards. Adjudications of the Council were often scoffed at by the offending newspaper, and the whole process never earned the respect of the industry it sought to regulate.⁷³

⁷¹ See GEOFFREY ROBERTSON, *PEOPLE AGAINST THE PRESS: AN ENQUIRY INTO THE PRESS COUNCIL* (1983).

⁷² CALCUTT I REPORT, *supra* note 29, at Appendix M (emphasis added). The Council subsequently defined the all-important "public interest" exception, as applied to a Member of Parliament, as that "capable of affecting the performance of her public duties." The test was ambiguous as stated, but was interpreted broadly in the Colquhoun matter. In adjudicating that complaint, the matter considered to meet this test was information that Maureen Colquhoun, a female MP "who [had] taken a strong stand on feminist issues" was sharing a house with another woman. *The Press and the People* 24th Annual Report of the Press Council, 72-78 (1977) [hereinafter *Press and People* (1977)], discussed in ROBERTSON, *FREEDOM, INDIVIDUAL*, *supra* note 27, at 101. With an exception so broadly worded and applied, what would fail to fall within its scope and therefore be truly private? Cf. text accompanying notes 149-52.

⁷³ See generally ROBERTSON, *FREEDOM, INDIVIDUAL*, *supra* note 28, at 99-102; CALCUTT I REPORT, *supra* note 29, at ch. 14.

One adjudication illustrates the media's disregard for the Press Council. When the Press Council condemned publication of photographs of a pregnant Princess Diana on

As recognized in *Calcutt II* the Press Complaints Commission, in its then brief existence, had fared little better in terms of gaining press respect and compliance with its adjudications. Many of its high-profile cases involved privacy issues, in which it applied Article 4 of its Code of Practice, addressing privacy:

Intrusions and enquiries into an individual's private life without his or her consent are not generally acceptable and publication can only be justified when in the public interest. This would include:

(i) Detecting or exposing crime or serious misdemeanor.

(ii) Detecting or exposing seriously anti-social conduct.

(iii) Protecting public health and safety.

(iv) Preventing the public from being misled by some statement or action of that individual.⁷⁴

Adjudications discussing privacy issues and interpreting this code section are discussed below, in relation to U.S. law categories. However, these adjudications, while they are the best indication we have of current English attitudes toward privacy, cannot be taken to mean too much. They are merely the rulings of a private body, without any state sanction.

a private beach, the *Sun* published the PC adjudication with an apology, taking the opportunity while doing so to republish the offending photograph with the headline "THIS IS WHAT THE ROW'S ALL ABOUT FOLKS!" The paper subsequently sold the photographs to newspapers world-wide. *The Press and the People*, 30th Annual Report of the Press Council, (1983) [hereinafter *Press and People* (1983)] ROBERTSON, FREEDOM, INDIVIDUAL, *supra*, at 100. The adjudication of a 1991 complaint to the PCC involving publication of a nude photo of Princess Eugenie, infant daughter of the Duke and Duchess of York, received a similar reaction from the offending newspaper. When the PCC upheld the complaint, the *Sun* published the adjudication, along with a nude photo of the Duke of York, headlined "WHERE'S YOUR SENSE OF FUN, ANDY?" *PCC Report*, *infra* note 139.

⁷⁴ CODE OF PRACTICE, Press Complaints Commission, Art. 4 (1991).

IV. THE TORT OF INVASION OF PRIVACY & FEMINIST THEORY

This chapter is, of course, far more focused upon the tort of privacy (which is not, of course, wholly separable from the doctrine's other aspects), and the aim here is to discover what, if anything, the public-private dichotomy and other tools of gendered analysis may help reveal about that tort.⁷⁵ It is therefore helpful at the outset to review the essentials of that dichotomy.

A. *The Public-Private Dichotomy.*

The public-private dichotomy, long a useful currency for analysis by traditional Western political thinkers, has also been widely used by feminist critical thinkers (in the law and in other disciplines) in the past two decades.⁷⁶ The theory goes, essentially, that women operate in the private sphere of society, men in the public. The extent to which this gender correlation to the public-private remains accurate in modern society is debatable. Still, this dichotomy's historical existence has been highly influential in the legal context.

Feminist legal scholars have found the public-private analysis useful in analyzing law's traditional reticence to recognize and respond to concerns of the private sphere, the arena of domestic violence, divorce, incest, and other crimes--usually against women and children. Instead,

⁷⁵ As for what the public-private (market-family) dichotomy has helped reveal about the larger, constitutionally-recognized privacy right, a good deal has already been written. Those writings are, of course, helpful in discerning precisely what this type of analysis can help reveal about the related tort by the same name. See generally CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* ch. 10 (1989); see also Anita L. Allen, *Taking Liberties: Privacy, Private Choice, and Social Contract Theory*, 56 U. OF CINN. L. REV. 461 (1987) [hereinafter Allen, *Taking Liberties*]; Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1 (1992).

⁷⁶ A more complete statement of the public-private dichotomy and its role in legal philosophy and analysis is stated in Chapter 2, which covers the various categories of feminist jurisprudential thought.

lawmakers and law enforcers have been far more concerned with regulation of the public sphere, the commercial marketplace. Many have been led to conclude, therefore, that the law is a sexist institution, if not by express intent, nonetheless in effect. For, if legal institutions do not even recognize or are not even concerned with harms that may be perpetrated against those in the private, domestic realm traditionally that of women, the law is denying such women its protection, failing to accord legal recognition to what are often gender-specific injuries.

Do the gender implications that traditional thinkers considered inherent in societal separation of the spheres of public from private have anything to tell us about the law of privacy? Does the history of law's deference to public-type injuries portend disparate application of privacy law for men and women? Is it indeed a fluke that a tort such as privacy was ever recognized, the tort being ostensibly one primarily concerned to redress a private-sphere injury?

1. *Is the Injury Really Private?* What if, however, the privacy tort is not really about redressing private sphere injuries? One commentator has written a convincing argument that what we now know as the tort of privacy in fact addresses both public and private-sphere injuries.⁷⁷ This variegated tort, as Professor Gerety calls it, actually concerns itself with injuries to the public person or identity in its appropriation and false light manifestations.⁷⁸

Briefly stated, these categories of cases indulge in "little or no inquiry into the relative secrecy, seclusion, or 'privateness'" of the aspect of personality involved.⁷⁹ Appropriation cases are actually concerned with a

⁷⁷ See Gerety, *Redefining Privacy*, *supra* note 13, at 246-67, 281-95.

⁷⁸ *Id.* at 246.

⁷⁹ *Id.* at 250.

plaintiff's public image for it is that image--not an unknown private persona--from which the misappropriating defendant is garnering benefit, whether of a commercial variety or not.⁸⁰ Similarly, the false light tort, very closely akin to defamation, is aimed at redressing an injury to public persona.⁸¹ As indicated by the name of the tort, each person concedes some part of his or her identity to public attention, to the public light. Each of us has some public image, and this is loosely equivalent to our individual reputations.⁸² Gerety argues that some false notions or shadows are always a part of that image; it is never a truly accurate reflection of the inner person. When a statement about an individual promulgates a serious discrepancy between the inner and outer person, a false light claim arises. Gerety argues that allusions to the private in these cases are really only incidental because privacy values are not at the core of the claim.⁸³ Reputation, as indicated in Chapter 4 on Defamation, is a public or market-place value.⁸⁴

Prosser's categories of intrusion and publication of private facts are, on the other hand, seen by Gerety as redressing truly private injuries. In regard to both categories of cases, however, he strictly aligns the

⁸⁰ *Id.* at 251-52.

⁸¹ For an excellent discussion of the fine line between defamation and false light invasion of privacy, see *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128 (7th Cir. 1985).

⁸² Gerety, *Redefining Privacy*, *supra* note 13, at 255.

⁸³ *Id.* at 256-57 (noting the overlap between appropriation and false light in several early privacy cases, including *Pavesich* and *Roberson*).

⁸⁴ *Cf. generally* Melville Nimmer, *The Right to Speak From Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935 (1968); John Wade, *Tort Liability for Abusive and Insulting Language*, 4 VAND. L. REV. 63 (1951) (both distinguishing defamation from false light privacy).

private -- regarding the space intruded or the information published, respectively -- with that which is out of sight of the public.⁸⁵ Gerety explains that in cases under these categories, it is not the unexcused touch, the physical presence in one's home, or the actual publication of information that invokes liability. "What [is] injured . . . [is] that peculiar aspect of dignity and freedom invested in reasonable expectations of privacy."⁸⁶ While Gerety's assessment of the four categories of privacy, demonstrating that two of them are not really about privacy at all, is somewhat convincing, I believe that Gerety has made a common mistake: he has allowed the "public" to define what is "private," consequently leaving too little protected. Professor Kalven recognized this phenomenon in a 1966 article, noting that privacy cannot be used to "delimit the public sphere but will turn out invariably to be residual,

⁸⁵ Gerety restricts the private by concepts which he labels "autonomy" and "intimacy." Gerety, *Redefining Privacy*, *supra* note 13, at 261-65. In the intrusion cases, these would allow first, the body, and second, the home, to be bastions of privacy. I am less clear on what would be considered private or intimate enough to justify liability for its publication in a private facts case. See *id.* at 281-289. Gerety is, however, obviously sensitive to the disclosures relating to sexuality, as well as to other privacy issues implicating sexuality. *Id.* at 296 Gerety cites *York v. Story*, 324 F.2d 450 (9th Cir. 1963) (finding violation under Civil Rights Act when woman who came to police station to report assault was photographed in "indecent positions" against her objections and when photographs were circulated around department); *Griswold v. Connecticut*, 381 U.S. 479 (1965); and *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199 (E.D.Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976) (upholding constitutionality of sodomy statute) which "all [illustrate] outright and outrageous invasion of the intimacies of sexuality and personality that we customarily and intuitively recognize as [invasion of privacy]." *Id.* at 296.

⁸⁶ *Id.* at 265.

simply what is left after the state or society has made its demand."⁸⁷

In addition, Gerety fails to note that the essence of the tort of publication of private facts is also "public." That is, it is the taking public of something private that creates the injury. Certainly Gerety is correct that privacy is at the core of such claims, but the harm comes in the public revelation of that private, and its legal recognition is on this basis.

B. Radical Feminism.

Radical feminist thought may also provide insights into how the privacy tort (particularly the "publication of private facts" variety) fits within a public-private dichotomy. Catharine MacKinnon has discussed the gendered nature of privacy. Privacy law, she says, assumes that the private is a sphere of choice, a sphere in which one is autonomous, free to make his or her own decisions, free to think his or her own thoughts. In the words of Bloustein, for example, it is the "final outpost of the self." Radical feminism has sought to explode these myths of the private, often seeking to bring legal institutions into the private realm in order to provide protection and to help "enforce" choices for women.⁸⁸ Hence the feminist motto that the personal is political, from whence it follows that

⁸⁷ Kalven, *Were Warren and Brandeis Wrong?*, *supra* note 13, at 327; but see Nicola Lacey, *Theory into Practice? Pornography and the Public-Private Dichotomy*, 20 J. OF LAW AND SOCIETY 93, 103 (1993) (quoting IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE*, 119-20 (1990)) (" . . . the private should be defined . . . as that aspect of his or her public life that any person has a right to exclude others from. The private in this sense is . . . what the individual chooses to withdraw from public view.").

⁸⁸ MACKINNON, *FEMINIST STATE*, *supra* note 75, at 190; but see Allen, *Taking Liberties*, *supra* note 75 (arguing that the decisional privacy attendant an abortion decision is a key starting point for women, but realizing that women need additional social empowerment in order to give them true choice).

the private (domestic/unregulated) should become public (regulated).⁸⁹

If you find MacKinnon convincing, it appears that the privacy tort -- to the extent it protects and shrouds that which is private -- does not seem to reflect or support feminist goals. For, if women are denied true choice in the private (domestic), they arguably benefit from the exposure of this denial. This is not necessarily the case, however, because that aspect of one's life that is concealed by privacy law is not necessarily synonymous with the "private" (unregulated) part of the public-private dichotomy.⁹⁰

The cases regarding identification of rape survivors, discussed more fully below,⁹¹ provide useful examples to illustrate the problems. Although rape is a crime that occurs most often in the private (domestic or "behind closed doors") sphere,⁹² it is deemed public (regulated) at the point when the police and judicial system become involved because from that juncture constitutional law mandates that rape survivors may be identified.⁹³ Accordingly, if a woman is to have any opportunity to redress her private sphere injury, she must bravely take it "public."

⁸⁹ See generally MACKINNON, *supra* note 75, at 187-94.

⁹⁰ Cf. Gerety, *Redefining Privacy*, *supra* note 13, at 291 ("the polar terms 'public' and 'private' must be taken strictly"; the two systems of rules, those regarding privacy and those regarding freedom of expression, and the two are or should be mutually and conceptually exclusive).

⁹¹ See *infra* Sect. V (A)(3).

⁹² The exceptions are those cases like the New Bedford gang rape or the bar room gang rape illustrated in the 1988 movie, "The Accused." Certainly rape is a private matter in that it is about sexuality; it is, however, public to the extent that it is about power relations. When it is prosecuted, it moves squarely into the public (regulated).

⁹³ There is possibly an exception if a state passes a statute forbidding such identification, but this is unclear after *Florida Star*. See *infra* notes 197-206 and accompanying text.

The woman essentially waives her right to privacy and with it the goal of saving herself the embarrassment and humiliation of having the general public know of her ignominious fate. The law does not truly enter the private sphere and redress injuries there; it brings the survivors of private sphere injuries into the public and exposes them to the harsh realities of sensational press coverage of their own private tragedies. The same analysis applies to cases of battered spouses and children. Is it possible that MacKinnon's goal of revealing the injustices of the private sphere is served by such revelations? As discussed below, there are those who believe that public exposure of such tales, particularly at the point they reach the judicial system, has the healthy effect of educating the public about the dynamics and prevalence of such crimes.⁹⁴ However, a great burden is carried by the survivor, who pays a higher price in terms of being ostracized and misunderstood in order that the public may know. At this juncture where privacy seems most valuable to the healing process of the survivor of such an ordeal, he or she is denied it for the "public good." While there is arguably a legitimate educational goal, the gruesome detail that often accompanies the naming of a rape survivor serves only to satisfy the morbid curiosity of the masses. Thus, taking such a private matter public can exact a high price from those most needing the sanctuary of their privacy.

C. Cultural Feminism

One of the most influential threads of feminist theory in the past two decades has been that classified as relational or cultural feminism. Its primary exponent, Carol Gilligan, has acknowledged differences between the masculine and the feminine, differences she characterizes in a way that accentuates the positive with and values the

⁹⁴ See *infra* Sect. V (A)(3) and accompanying text (discussing one side of the debate on revealing rape survivors identities).

feminine in a manner that traditional scholarship has not.⁹⁵ As discussed in Chapter 2, Gilligan speaks of a "different voice", a feminine voice grounded in a "standard of relationship, an ethic of nurturance, responsibility, and care"⁹⁶ which creates a different moral imperative for women. Rather than embracing the traditional, dominant masculine rights-based ethic of justice, those who speak with the (feminine) "different voice" orientate their value systems and decision-making processes around this relational-central ethic of caring.⁹⁷

The feminine decision-making ethic is further characterized by contextualized assessment--a desire to know all the facts, not only those that the masculine, mainstream jurisprudence considers "legally relevant."⁹⁸ This ethic eschews application of hierarchies of abstract rights and values.⁹⁹ The reality of human pain and suffering often rises to the forefront, and moral dilemmas are viewed in terms of the conflicting responsibilities they create.¹⁰⁰

⁹⁵ See generally CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982). For a more complete discussion of Gilligan's work, along with that of other relational feminists, see Chapter 2, Sect. IV.

⁹⁶ *Id.* at 159-60.

⁹⁷ *Id.* at 100. Gilligan writes that "[w]omen's insistence on care is at first self-critical rather than self-protective, while men initially conceive obligation to others negatively in terms of noninterference." *Id.* The fact that men attribute such value to noninterference is telling in the context of a privacy discussion, indicating that privacy is actually something more highly valued by men than by women. See also Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988) [hereinafter West] (offering a feminist jurisprudence stemming from Gilligan's work but going a step further in embracing biological determinism as the cause).

⁹⁸ *Id.* at 101.

⁹⁹ *Id.* at 101-02.

¹⁰⁰ *Id.* at 105. The truths of relationship for women are found in connection, "in realizing that self and other are interdependent and that life . . . can only be sus-

The masculine ethic, on the other hand, relies on a set of rules or truths abstracted from life. This mainstream ethic, which characterizes the present system, endorses a hierarchy of rights which can be objectively applied to various conflicts without the expenditure of any emotion or consideration for the individuality of the parties involved. Separation from others and the pre-eminence of the individual is supported by this ethic of rights.¹⁰¹

Whether or not one finds Gilligan's argument persuasive as to the alignment of gender with the two value systems described and labelled as masculine and feminine, she does characterize as "masculine" a system that is descriptive of the legal system of any of a number of Western societies. In these legal systems, the rights of the individual are the starting point for analysis, and complex relational or contextual webs are generally regarded as irrelevant in legal decision making.

At first glance, consideration of the tort of privacy in the light of Gilligan's descriptive dichotomy of moral decision making reveals it to be far more "feminine" than "masculine." Its primary concern with self-dignity and psychic injury could be linked to a feminine recognition that feelings are important and their protection merits legal attention. The "feminine" capacity for empathy with someone who feels violated by a disclosure damaging to his or her self-worth is arguably much greater than that of the masculine, which might view such an injury as too insignificant to be worthy of legal recognition and redress. Men are typically more disturbed by injuries that cause tangible harm to person or property and less disturbed by mere hurt feelings, which they have historically been hasty to

tained by care in relationships." *Id.* at 127.

¹⁰¹ *Id.* at 164.

attribute to a hypersensitivity associated with women.¹⁰² Those focused on care and relational issues are perhaps also better able to see the impact of privacy invasion on relationships. One whose self dignity has come under attack is impaired in his or her ability to form and continue relations. Having wrested away from one the discretion to share or not to share with others various aspects of one's very personality overhauls the manner and bases on which relationships function.

The argument that privacy law reflects values consistent with cultural feminism is supported by the writings of Professor Charles Fried. He has observed that personal relations such as love, trust and friendship -- which we have identified as feminine concerns -- "depend on a secure sense of self".¹⁰³ Only if an individual is morally secure

¹⁰² See, e.g., Kalven, *Were Warren and Brandeis Wrong?*, *supra* note 13, at 329 ("Even in 1890 it must have been abundantly clear that the common law had a highly cautious and ambivalent set of reactions toward giving protection against dignitary and emotional harms"). See generally Martha Chamallas & Linda Kerber, *Women, Mothers and the Law of Fright*, 88 MICH. L. REV. 814, 816-19 (1990) [hereinafter Chamallas and Kerber, *Law of Fright*] (recovery barred for harms classified as emotional and without precise masculine analogues); Hubert W. Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193 (1944) (exhibiting great awareness of plaintiffs as women in emotional injury cases; presenting images of women as neurotic). As has recently been documented in the case of the law of fright, judicial opinions often demonstrate that the all-important "categorization of a legal harm is an active process: in a gendered world, injuries are socially constructed so that the gender of the person claiming a loss can affect the legal conceptualization of the harm." Chamallas and Kerber, *Law of Fright*, *supra* at 816. Furthermore, the perceived gender differences can effect a gender disadvantage in the legal context. *Id.* Chamallas and Kerber discuss the 1861 English case, *Lynch v. Knight*, as illustrative of the traditional consciousness of gender in the law. [1861] IX H.L.Cas 576, 11 Eng. Rep. 854. The various judges' opinions in the case tend to "de-legitimize" women's harms as ephemeral and less real than those of men, openly embracing a double standard based on gender.

¹⁰³ Charles Fried, *Privacy: Economics and Ethics* A Comment on Posner, 12 GA. L. Rev. 423, 427 (1978).

is he or she free to be "selfless or selfish, generous, artistic, inspired or banal" to interact with others, to form relations as he or she chooses.¹⁰⁴ It is an easy step beyond this to say that women, as traditional guardians of such personal relations, would place a greater value on privacy.

Additional indications are found in privacy law's early tradition of foregoing rigid formulae, a tradition that reflects Gilligan's feminine ethic. As noted earlier, the gravamen for the privacy tort contemplated by the nineteenth century article was an outrageous affront to human dignity. In making the determination of whether such an affront had occurred, all factors were to be considered. A *prima facie* case was stated, essentially, by statements which impaired an individual's "right to pursue and obtain happiness"¹⁰⁵ or by showing intrusion "beyond the limits of decency."¹⁰⁶ No complex web of rules delineating the relevant from the irrelevant applied.¹⁰⁷ Pigeon-holing the

¹⁰⁴ *Id.*

¹⁰⁵ *Melvin v. Reid*, 297 P. 91, 93 (Cal. App. 1931). It is important to note that the court did not expressly characterize this as privacy. It found such a label unnecessary because the right it identified was mandated by the California constitution.

¹⁰⁶ *Barber v. Time, Inc.*, 159 S.W.2d 291 (Mo. 1942). See also *Daily Times Democrat v. Graham*, 162 So.2d 474 (Ala. 1964) ("wrongful intrusion into one's private activities in such manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities").

¹⁰⁷ This is not to say that no rules applied. The 1942 case of *Barber v. Time, Inc.*, is, perhaps, representative of early privacy cases in this regard. 159 S.W.2d 291 (Mo. 1942). The *Barber* court stated the general rule that liability accrues "only where the intrusion has gone beyond the limits of decency." *Id.* at 293. After discussing the gist of Warren & Brandeis's germinal article, the court went on to enumerate six limitations related to the tort. Herein the court noted that consent and "matters of public or general interest" provided defenses to the tort, but that truth and "absence of malice" did not. *Id.* at 294. Still, however, great latitude was given to the jury to

allegation into one of the now-familiar Prosser categories was not the starting point. Rather, the jury hearing a given case was considered to be the appropriate arbiter, after hearing the entire case, whether an invasion of privacy had occurred.

Given the lack of certainty and the absence of a list of elements constituting the tort, it is hardly surprising that so many legal commentators objected to the flexibility associated with the privacy action¹⁰⁸ and that, in 1960, Prosser attempted to formalize certain rules by articulating the four categories of privacy invasion.¹⁰⁹ That the categorization, with its accompanying articulation of the elements comprising each type of invasion, has enjoyed widespread usage ever since is equally consistent with a "masculine" ethic of justice and moral decision making, an ethic that applies abstract rules defining relevance or irrelevance and that validates or invalidates claims based on satisfaction of these.

Closer examination of the motivation for adopting a privacy right and the various legal fictions that have supported it in its predecessor forms (and in some cases still support it) reveals contradictions of the preceding analysis and indicates that privacy law may be a creature

determine whether an invasion of privacy had occurred. The court wrote that, in determining liability, "the knowledge of the defendant, the sex, station in life, previous habits of the plaintiff with reference to publicity, and other similar matters are considered." *Id.*

While current (post-Prosser) legal analysis would begin with categorization of *Barber* as a "publication of private facts" case, in the early days of privacy, such a preliminary step was unnecessary. This was because the jury was expected to make a fairly subjective and straightforward judgment about whether the act complained of was egregious enough to justify imposition of liability.

¹⁰⁸ See generally Gary Bostwick, *A Taxonomy of Privacy: Repose, Sanctuary and Intimate Decision*, 64 CALIF. L. REV. 1447 (1976); Gerety, *Redefining Privacy*, *supra* note 13; Kalven, *Were Warren & Brandeis Wrong?*, *supra* note 13; Posner, *supra* note 45.

¹⁰⁹ See *supra* note 55 and accompanying text.

of the "masculine" ethic. Recall from the philosophical discussion above that privacy is highly individualized and that one of its primary motivators is self-actualization.¹¹⁰ One commentator has opined that the cult of privacy is a byproduct of individual competitiveness.¹¹¹ Such concerns are, at base, diametrically opposed to cultural feminism and the communitarian values it is seen as fostering. Not only is the form masculine in the sense that it is "rights" oriented,¹¹² the substance is masculine because the goal is individual rather than relational.¹¹³

In arguing for continued recognition of the privacy right, Prof. Bloustein has stated (albeit unwittingly) a cogent argument that privacy is about individualism, full stop, rather than about protection of self dignity as enabling entry into meaningful relationships and facilitating the feminine goal of interdependence.

The man who is compelled to live every minute of his life among others and whose every need, thought, desire, fancy or gratification is subject to public scrutiny, has been deprived of his individuality and human dignity. Such an individual merges with the mass. His opinions, being public, tend never to be different; his aspirations, being known, tend always to be conventionally accepted ones; his feelings, being openly exhibited, tend to lose their quality of unique personal warmth and to become the feelings of

¹¹⁰ See *supra* Sect. II.

¹¹¹ HIXSON, *PRIVACY*, *supra* note 25, at xv (referring to A.W. Arndt).

¹¹² See generally *A Critique of Rights*, 62 TEX. L. REV. 1363 (1984); 36 STAN. L. REV. i (1984) (symposium issue on rights critique by critical legal studies scholars); Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984); Elizabeth Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U.L.REV. 589 (1986); Peter Westin, *The Rueful Rhetoric of "Rights,"* 33 UCLA L. REV. 977 (1986); CAROL SMART, *FEMINISM AND THE POWER OF LAW* (1989).

¹¹³ See West, *supra* note 97.

every man. Such a being, although sentient, is fungible; he is not an individual.¹¹⁴

Professor Hixson has elaborated on the negative aspects of the individualism that Professor Bloustein found so dear. Hixson has argued that the individualist concept of society which provides a foundation for privacy is detrimental to the common welfare of the citizenry.¹¹⁵ In other words, "merging with the mass" is not necessarily an evil if a greater common good is our goal.¹¹⁶ Where the two are inconsistent, a greater social good must take precedence over individual desires. Cultural feminism's celebration of the feminine voice is far more consistent with Hixson's collective social goals and good than with Bloustein's individual ones, which are decidedly masculine, as cultural feminism defines it.

V. GENDER TRENDS IN PRIVACY CASES

As previously noted, the predominant classification of privacy cases in the United States was stated by Dean William Prosser in 1960. This classification has not gained express acceptance in Britain, although the various category labels sometimes appear as terms of art of sorts in British discussions on the topic.¹¹⁷ While these categories are not particularly useful from a standpoint of feminist critique, they are used here to facilitate organization. In fact, two of these four privacy categories, intrusion and appropriation, have over the past 20-30 years, strayed so far from the core principle of privacy that I have elected not to discuss them here. Analysis of

¹¹⁴ Bloustein, *Answer to Prosser*, *supra* note 13, at 820.

¹¹⁵ See generally HIXSON, *PRIVACY*, *supra* note 25, at chs. 1, 6; see also Prosser, *supra* note 55.

¹¹⁶ See also Posner, *supra* note 45 (similarly questioning Bloustein's assumption that conformity is a bad thing).

¹¹⁷ See, e.g., CALCUTT I REPORT, *supra* note 29, at v-vii.

each of these now generally follows that of other torts: intrusion under fraud, misrepresentation, and trespass; and appropriation under misappropriation of commercial right or a similar property-oriented harm. As noted previously, many of the recent cases in particular provide little insight into or discussion of the human dignity harm that was originally the essence of the privacy action and which remains the hallmark in the fourth category: publication of private facts. In addition to publication of private facts cases, I also discuss false light invasion of privacy because I think it helps illustrate the vagaries associated with sexual and misogynist communications about women.

A. *Publication of Private Facts*

Perhaps the most common variety of privacy actions are those involving public disclosure of private or embarrassing facts. It was this sort of invasion which concerned Warren and Brandeis a century ago when they initially proposed legal recognition of a cause of action that would protect an individual's self esteem and dignity. The essence of this action is not that the published material is false, but rather that it is private. The injury resulting from such a publication is supposedly not the sort of reputational one redressed by a defamation suit, but rather is a more internalized psychic injury, an affront to an individual's dignity, with the resultant harm typically being embarrassment or humiliation.

While publication of private facts cases are rather common, they are seldom successful suits for plaintiffs. This is so because even though the veracity of the offending statement is not a defense, not just any statement of private facts will establish liability. While slightly different standards apply in the various U.S. jurisdictions, commonly a two-prong test must be satisfied before liability is imposed: that the material is (a) highly offensive to a reasonable person and (b) not of legitimate

public interest.¹¹⁸ Not only has the latter standard evolved through the common law, it has also been endorsed by the U.S. Supreme Court, which has accorded it constitutional significance.¹¹⁹

The first element, "public disclosure," differs from the "publication" element of defamation law. Public disclosure means literally making a matter public knowledge.¹²⁰ Merely conveying the information to one or two other people is insufficient.¹²¹ Any media publication

¹¹⁸ RESTATEMENT (SECOND) OF TORTS at § 652D [hereinafter RESTATEMENT (SECOND)].

¹¹⁹ See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

¹²⁰ *Pangallo v. Murphy*, 243 S.W.2d 496 (Ky. 1951); RESTATEMENT (SECOND), *supra* note 118, at § 652D comment A; *Prosser, Privacy*, *supra* note 55, at 393-94 (citing *Trammell v. Citizens News, Co.*, 285 Ky. 529, 148 S.W.2d 708 (1941); *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967 (1927); *Bennett v. Norban*, 396 Pa. 94, 151 A.2d 476 (1959)). Even Warren and Brandeis suggested that liability not be imposed for oral remarks because the resulting injury would be so "trifling." *Warren & Brandeis*, *supra* note 1, at 217.

¹²¹ Although this is now this general rule, it was not always so. See, e.g., *Thompsons v. Adelberg & Berman, Inc.*, 181 Ky. 487, 205 S.W. 558 (1918); *Biederman's of Springfield, Inc. v. Wright*, 322 S.W.2d 892 (Mo. 1959).

The Florida statute at issue in *Florida Star v. B.J.F.*, made it unlawful for any instrument of mass communication to publish the name of any sexual offense victim. 491 U.S. 524 (1989). The statute's distinction between the media and others, such as back-yard gossips, who might disseminate the sensitive information caused great discussion amongst the Justices. Based on this distinction, the plurality opinion expressed doubt about the effectiveness of the statute to protect victims because of its probable under-inclusiveness. *Id.* at 540. Justice Scalia, in his concurrence, also picked up on this matter, arguing that the law, contrary to state and plaintiff claims, did not protect an "interest of the highest order" because it did not prohibit private dissemination of the fact of the survivor's rape among her friends and acquaintances. *Id.* at 542 (Scalia, J., concurring). The dissenters, on the other hand, had no difficulty with the media/non-media distinction drawn by the statute. They respected the prerogative of the state to determine who poses a significant threat of intrusion to rape victims and to tailor their prohibition on publication accordingly. *Id.* at 549.

usually suffices. It is this element which seems to distinguish the cause of action from simple rumor-mongering. While the distinction is sensible from a pragmatic standpoint, seeking to avoid the proliferation of such actions, it may not be sensible when the very purpose of the action is examined. If this is an action aimed at redressing psychic injury, perhaps legal recognition should be given the injury suffered when only a few people learn of the private information, for those few may be amongst the plaintiff's secondary acquaintances or colleagues.¹²² Having those whose lives are somewhat entangled with the plaintiff's, but whom he or she would not ordinarily tell the guarded information, learn of it arguably does far more damage than if thousands who do not know and never will personally know him or her hear the startling revelations.¹²³ As discussed previously, if this right of priva-

(White, Rehnquist, O'Connor, JJ, dissenting).

¹²² Cf. Gerety, *Redefining Privacy*, *supra* note 13, at 284-86 (defending the distinction between gossip and mass publication: "Sheer numbers make a difference. No one can make privacy absolute; few ever try.")

¹²³ There are cases where, I think, widespread dissemination is just as traumatic for the plaintiff as if gossip spread it only to a circle of secondary acquaintances. Take, for example, the publication of a rape survivor's name, as discussed in the previous note. The wound to self-dignity is already so great by virtue of the rape that the survivor is justifiably traumatized just by the prospect that thousands of people will know her name, will know that she suffered such a disgraceful fate. Having secondary acquaintances know such information is surely difficult enough, but having an infinite number of complete strangers know aggravates/exacerbates the injury. This position has been recognized in various cases. See, e.g., *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (including dissent of White, O'Connor, JJ, Rehnquist, C.J.).

Publication of a photograph of a survivor, either alone or stating her name, adds yet another dimension to the harm. Consider the case of Jill Saward, the survivor of the Ealing Vicarage rape. A full-page photograph of her, with small black bands over her eyes, was published shortly after the rape; a *Sun* photographer took it as she was on her way to church the following Sunday. She described in a book, published four years after the rape, the trauma of

cy is about maintaining self esteem and human dignity and making one's own decisions about the bases on which he or she will enter relationships, conveyance of sensitive information to secondary acquaintances should also be at the subject's own discretion. As one court recognized, the right of privacy is, after all, not a claim to total secrecy but a claim of the "right to *define* one's circle of intimacy".¹²⁴ This requirement is arguably gendered in the sense that women are less likely than men to be the subject of a publication that invades their privacy because they are less likely to be the subject of media attention at all. It is also consistent with common sense to assume that women are more likely than men to be the subject of non-actionable gossip that invades their privacy.

A second requirement of this action is that the offending material must not already be public. This means that if the plaintiff has not sought to conceal the information nor to keep it private in any way, subsequent publication by a media source cannot be the basis of a suit.¹²⁵ This also means that if the information is a

being in public and knowing that complete strangers recognized her from the photograph. "Everyone will know who I am and what I've been through. They should not have that access to me. It hurts." JILL SAWARD, RAPE: MY STORY 60 (1990).

¹²⁴ *Briscoe v. Reader's Digest Ass'n*, 93 Cal. Rptr. 866, ___, 483 P.2d 34, 37 (1971). The *Briscoe* court prefaced this with recognition that

Men fear exposure not only to those closest to them; much of the outrage underlying the asserted right to privacy is a reaction to exposure to persons known only through business or other secondary relationships. . . . Loss of control over which "face" one puts on may result in literal loss of self-identity [] and is humiliating beneath the gaze of those whose curiosity treats a human being as an object.

Id. (citing A. WESTIN, *PRIVACY AND FREEDOM* 1023 (1967)); *cf.* Charles Fried, *Privacy*, 77 YALE L.J. 475 (1968).

¹²⁵ Compare *Sipple v. Chronicle Publishing Co.*, 201 Cal. Rptr. 665 (Ct. App. 1984) (homosexual man who was a leader in San Francisco's gay community and whose name had

matter of public record available under state or federal freedom of information laws, the suit cannot succeed.¹²⁶ The rationale goes that if the data is available to the public, it cannot logically be the subject of a "private facts" suit because it is only conferring additional "publicity." This analysis is not very realistic, however. There is a great difference between the *potentiality* of a large number of people searching out such information from some obscure public clerk's office and its blaring publication in a media vehicle.¹²⁷ In effect, the media source has deemed it newsworthy, and the subject must live with the fact that information which otherwise would have lain dormant is not only in the public domain, but may, indeed, be the focus of great public attention.¹²⁸

been published in gay publications lost suit when *San Francisco Chronicle* noted his sexual preference after he prevented then President Ford's assassination and thus came into the public eye) with *Diaz v. Oakland Tribune, Inc.*, 188 Cal. Rptr. 762 (Ct. App. 1983) (woman who had undergone sex-change operation, but who had told only family and closest friends, successfully sued when newspaper revealed the matter).

¹²⁶ See, e.g., *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *Howard v. Des Moines Register & Tribune Co.*, 283 N.W.2d (Iowa 1979), cert. denied, 445 U.S. 904 (1980); *Rawlins v. Hutchinson Publishing Co.*, 543 P.2d 988 (Kan. 1975).

¹²⁷ This distinction has been recognized in a number of cases and by several commentators. See *Briscoe v. Reader's Digest Association*, 93 Cal. Rptr. 866, 483 P.2d 34, 41 (1971) (drawing the distinction between "hot" news and what is in the "dusty archives"). See also Marc Franklin, *A Constitutional Problem in Privacy Protection: Legal Inhibitions on Reporting of Fact*, 16 STAN. L. REV. 107 (1963) [hereinafter Franklin, *Legal Inhibitions on Reporting Fact*]. Cf. *Meetze v. Associated Press*, 95 S.E.2d 606 (S.C. 1956) (age of 12-year-old mother was a matter of public record; one cannot claim right to privacy with regard to a matter that is, therefore, not private).

¹²⁸ A similar criticism applies to the long-dominant rule on so-called passage of time cases, which allows past crimes and other private matters to be re-publicized--even decades on. RESTATEMENT (SECOND), *supra* note 118, at § 652D, comment k. But see *Melvin v. Reid*, 297 P. 91 (Cal. App.

The "highly offensive disclosure" element of the private facts action is a relatively amorphous standard, made even more unpredictable by virtue of a jury's application. The *Restatement (Second)* drafters have opined that privacy is relative not only to the customs of a particular time and place, but also to the occupation of the plaintiff and to the habits of those around him or her. Only if a "reasonable person would feel justified in feeling seriously aggrieved by it" is a public disclosure actionable.¹²⁹

As the cases below illustrate, the subjectivity of this standard has yielded an erratic series of decisions and a good deal of inconsistent precedent over the years. Furthermore, as has been discussed in various other contexts, the notion of a "reasonable person" has typically been an inherently gendered one, essentially meaning "reasonable man."¹³⁰

Finally, in a private facts case the plaintiff bears the burden of proof regarding the material's lack of "legitimate public concern," also referred to as the absence of "newsworthiness." Typically this is the most onerous requirement for a plaintiff to meet, as "newsworthiness" is given a broad reading by the courts.¹³¹

1931); *Briscoe v. Reader's Digest Ass's*, 483 P.2d 34 (Cal. 1971) (two California cases allowing action on evidence of "rehabilitation" of the subjects; continuing validity of cases is suspect in light of subsequent Supreme Court rulings).

¹²⁹ RESTATEMENT (SECOND), *supra* note 118, § 652D, comment C.

¹³⁰ See Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV. 575 (1993); Joanne Conaghan and Wade Mansell, *THE WRONGS OF TORT* ch. 7 (1993). This has recently changed in the U.S. law on sexual harassment, as the "reasonable woman" standard now prevails.

¹³¹ As a procedural matter, the judge may declare whether or not a disclosure is newsworthy, as a matter of law. *Virgil v. Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976); *Buller v. Pulitzer Publishing Co.*, 684 S.W.2d 473 (Mo.App.1984). Most cases, however, go to the jury, which makes the determination.

In fact, as courts have been prone to interpret this element, to ask if a matter which received press coverage is "newsworthy" is to beg the question because so many have made the former the definition of the latter.¹³² As the *Restatement (Second)* drafters noted, it includes "matters of genuine, even if more or less deplorable, popular appeal."¹³³ One commentator has observed that about the only way to lose with the newsworthiness defense is in the presence of aggravating factors such as press sensationalizing of the information or by use of intrusive or otherwise unethical techniques in gathering information for the story.¹³⁴

1. *The Impact of Public Figure Status on Private Facts Cases.* As in the defamation context, public figures and officials frequently find that they are entitled to less protection from press invasions than are private citizens. Few matters seem to be securely within the zone of privacy of public officials because courts appear given to approving even the most tenuous connections between various bits of private data and an individual's fitness

See, e.g., *Hawkins v. Multimedia, Inc.*, 288 S.C. 569, 344 S.E.2d 145 (1986); *Diaz v. Oakland Tribune, Inc.* 188 Cal. Rptr. 762 (Ct. App. 1983).

¹³² See generally WATKINS, *THE MASS MEDIA AND THE LAW* 135 (1990) [hereinafter WATKINS, *MASS MEDIA AND LAW*]. Cf. *Virgil v. Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975), cert. denied, 425 U.S. 998 (1976) (stating a "community mores" test for newsworthiness; when "publicity . . . becomes a morbid and sensational prying into private lives for its own sake" so that a reasonable member of the public would say "he [sic] had no concern" it is not newsworthy).

¹³³ RESTATEMENT (SECOND), *supra* note 118, §652D at comment G.

¹³⁴ See WATKINS, *MASS MEDIA AND LAW*, *supra* note 132, at 136-37 (citing *Bimbo v. Viking Press, Inc.*, No. 76-1423-S (D. Mass. 1981); *Hawkins v. Multimedia, Inc.*, 288 S.C. 569, 344 S.E.2d 145(1986); *Buller v. Pulitzer Publishing Co.* 684 S.W. 2d 473 (Mo. App. 1984)).

for office.¹³⁵ Commentary on candidates for the Democratic Party nomination for President of the United States in the 1992 election illustrates well the press tendency in this area. In August and September of 1991, headlines included "Private liaisons put Democrats in public eye"¹³⁶, "[Candidate] gets jump on personal issues"¹³⁷, and "[Three] in Democratic field play the field."¹³⁸ In the run-up to the 1988 Presidential election, Democratic front-runner Gary Hart, a married man, suffered the ignominious fate of being virtually forced from the race after the *Miami Herald* ran a front-page story reporting his tryst weekend with model Donna Rice.

Adjudications by the Press Complaints Commission have given mixed guidance on the breadth of any zone of privacy retained by a public official in England. Within the first six months of 1991, the PCC decided two complaints which are somewhat difficult to reconcile. The first involved the highly publicized complaint of Labour MP Clare Short. Short was the subject of a January 1991 article in the *News*

¹³⁵ For additional commentary on coverage of politicians' private lives, see MARC FRANKLIN, *MASS MEDIA LAW* 329 (2d ed. 1982). See also *infra* notes 149-53 and accompanying text (discussing the Maureen Colquhoun case from 1977).

¹³⁶ *The Times* (London), Sept. 5, 1991 (focusing upon potential candidates' past relationships with famous entertainers and upon another candidate's rumored extramarital affairs).

¹³⁷ *USA Today*, Int'l ed., 18 Sept. 1991, at 3A (covering a news conference held by Arkansas Governor Bill Clinton who, alongside his wife Hillary, answered personal questions at a press conference; also reporting a poll revealing that 62% of Democrats in New Hampshire believe Clinton is right in refusing to discuss aspects of his personal life). See also *Democratic star makers scent a ballot winner*, *The Times* (London), Sept. 7, 1991 (noting that Governor Bill Clinton, a likely candidate for the Democratic nomination, has been the subject of "adultery and drugs" rumors).

¹³⁸ *USA Today*, Int'l ed., 19 Sept. 1991, at 2A (focusing upon bachelor status of three of the likely candidates for the Democratic nomination).

of the World, an article resulting from various intrusive news-gathering techniques employed by reporter(s) in compiling (or attempting to compile) data for it.¹³⁹ Amongst the matters covered in the offending report was Ms. Short's friendship with John Daniels in the early 1970s. This was of particular interest because in 1979, after Daniels had left Britain and then returned, he was murdered, a crime for which no one was ever charged. The article implied that Mr. Daniels had been involved in organized crime. Regarding this portion of the story, Short agreed that the newspaper was justified in inquiring into this aspect of her life, even after the passage of considerable time.¹⁴⁰ However, the Commission drew a line between inquiry and the publication of its results which might not reveal anything "related to the public interest." Referring to "public interest" language in its Code of Practice,¹⁴¹ the Commission clarified that this is not "whatever happens to interest the public" and noted that maintenance of the distinction is particularly important in respect of people in public life.¹⁴²

A second issue arising from the Short complaint was the contact made by the *News of the World* reporter to Ms. Short's former husband. The Commission found indefensible the reporter's conduct in contacting him, knowing that he

¹³⁹ Actually, the complaint by Ms. Short had quite a long history. Ms. Short argued that she had been the object of a vilification campaign by the tabloids because of her 1986 Bill against pornography. The *News of the World* had previously sought to link her with a "naughty advertisement" in the *Tribune*. Subsequently, the tabloid had focused attention on Short in a report on a woman who had worked for Short for a very brief period seven years earlier and who was then being questioned by the Police Obscene Publications squad. Press Complaints Commission, *Report No. 1*, 10 (Jan.-June 1991) [hereinafter *PCC Report No. 1*].

¹⁴⁰ *Id.* at 11.

¹⁴¹ See *supra* text accompanying note 74.

¹⁴² *PCC Report No. 1*, *supra* note 139, at 11.

was emotionally unstable. The paper subsequently reported that it discussed with him the purchase of a "topless" photo of her, or of one depicting her in a night-dress.¹⁴³ The Commission upheld Short's complaints regarding the tactics used in investigating the story.¹⁴⁴

It is difficult to garner any free-standing principles from the PCC's cryptic and disorganized adjudication of the Short complaint. However, comfort may be taken from the sympathy shown to Short because of the intrusive news-gathering techniques used by the reporter. Additionally, the Commission's statement that "public interest" is narrower than "anything that interests the public" seems to distinguish it from the very broad American "newsworthiness" test.¹⁴⁵

Soon after the Short adjudication, the PCC had opportunity to decide another privacy case related to a public official. The offending story was a trivial piece about Neil Kinnock being taunted by neighborhood youths while he was "ticking off his daughter."¹⁴⁶ The Commission did not uphold the complaint, noting that "politicians seek, experience and must expect regular exposure to the press."¹⁴⁷ Although they characterized the piece as "triv-

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 12.

¹⁴⁵ Of course, these are not true analogues because the American "newsworthiness" test applies also to private persons involved in public events, whereas the PCC in the Short adjudication was stating a principle applicable in public figure cases.

¹⁴⁶ *Id.* at 17. In commenting on a related issue, the PCC was undisturbed by the paper's publication of the Kinnocks' address, information which it noted was already well-known. *Id.* See also Press Complaints Commission, Report No. 28, 5 (Jan.-Feb. 1995) (publication of MP Teresa Gorman's address not a violation of her privacy, though mention that she was abroad in Portugal was imprudent). But see adjudications related to MP Jack Straw and MP Ann Winterton, *infra* notes 149-50 and accompanying text.

¹⁴⁷ *Id.*

ia", they justified its publication by noting that it is the sort of stuff "in which readers might be interested."¹⁴⁸ The precise language of the finding is noteworthy for its inconsistency with that in the Short case, where the PCC expressly disclaimed that "public interest" is synonymous with whatever interests the public.

Various adjudications involving publication of information about Members of Parliament are similarly scatter-shot in approach and do not always include meaningful discussion of the public interest concept. Publication of the address of Labour MP, Jack Straw, for example, was found to contribute nothing to a story reporting that he owned three homes. Because not in the public interest, publication of the address was held to be an invasion of his privacy.¹⁴⁹ Similarly, Mrs. Ann Winterton, MP, complained about an article concerning a plan to divert a footpath which was a security risk to her home. The article detailed the risk in text and with a photograph of the house. The Commission found that the newspaper was justified in reporting on a local planning issue which was controversial, but that the photo added nothing to the story and may have put Mrs. Winterton at risk. Accordingly, the complaint was upheld.¹⁵⁰

The complaint of MP candidate Keith Murray-Hetherington about a report that he had not paid his child support was rejected. The Commission stated that this was not a private matter that breached Clause 4.¹⁵¹ Oddly, it did not also refer to the public interest in such a report given that the story was, after all, about a candidate for

¹⁴⁸ *Id.*, discussed in Blom-Cooper & Pruitt, *Privacy Jurisprudence of PCC*, *supra* note 29, at 147.

¹⁴⁹ Press Complaints Commission, *Report No. 10*, 8 (June 1992).

¹⁵⁰ Press Complaints Commission, *Report No. 18*, 7 (May 1993).

¹⁵¹ Press Complaints Commission, *Report No. 31*, 5 (Aug.-Oct. 1995).

Parliament. MP Tony Marlow complained about an article that commented on his relationship with his wife and secretary. The article's comments were linked to an Early Day Motion Mr. Marlow had tabled in the House of Commons, a motion that described the presenter of the BBC radio program, "Woman's Hour" as a "self-declared feminist with an unrepresentative life style" and questioned her ability to act in an unbiased manner. Mr. Marlow's complaint was rejected on the basis that the comment on his "domestic arrangements" was justified at a time when he was calling for the dismissal of a broadcaster on the basis of what he considered her unorthodox views of marriage.¹⁵² The adjudication did not mention public interest, but it did note that the information was already in the public domain.

Comparison of the Short matter to a 1977 Press Council decision about another woman MP is also interesting. The *Daily Mail* published several stories about Maureen Colquhoun, MP, with the most objectionable one reporting that she had left her "matrimonial home" to "share an East End house with a close woman friend."¹⁵³ The *Daily Mail* took the position that the breakup of Colquhoun's marriage was a legitimate news story in the public interest. The paper's editor stressed that the gist of the story and all inquiries were directed toward a legitimate area of comment related to her "becoming involved with the women's liberation movement and . . . into its more radical section."¹⁵⁴ In its adjudication, the Council distinguished between private persons and public officials, noting that if the comments in question had been written about the former, an unacceptable invasion of privacy would have occurred. The Council went on to say that if Colquhoun were just any MP, the statements might be ruled invasive because Members of

¹⁵² Press Complaints Commission, *Report No. 13*, 6 (Sept. 1992).

¹⁵³ *Press and People* (1977), *supra* note 72, at 73.

¹⁵⁴ *Id.* at 76.

Parliament are also "entitled to a degree of protection in their private lives."¹⁵⁵ However, the Council found that Colquhoun was particularly vulnerable to comment on her private life because she was a feminist who had been open with her views on feminist issues. The Council found that this stance brought

the break-down of her marriage and the fact that she had left what had been her matrimonial home to share a house with another woman into the area of those matters which the public is entitled to know as being capable of affecting the performance of her duties or affecting public confidence in her views as a Member of Parliament.¹⁵⁶

The Press Council's decision is neither correct nor well-reasoned. They seem oblivious to the fact they endorsed a sensationalist story and managed to justify it merely because the subject is an admitted feminist. After all, there really is nothing remarkable about a woman, especially one who already publicly embraces feminism, sharing a house with another woman. As one commentator has written, the more newsworthy item about a woman like Ms. Colquhoun would be on reporting she had "taken up residence with a notorious male chauvinist."¹⁵⁷ By saying that Colquhoun was not just any MP -- based on matters essentially related to her sexuality and her sexual politics -- the Council managed to rationalize a different newsworthiness standard for her.

Perhaps the appropriate test for what is publishable should be that which *does* affect public performance, not

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* It is noteworthy that the Press Council upheld Ms. Colquhoun's woman friend's complaint about the publication of her name. The Council "deplored her identification in the gossip column . . . as being a gross intrusion into her privacy" not justifiable on the grounds of public interest. *Id.* at 78.

¹⁵⁷ ROBERTSON, FREEDOM, INDIVIDUAL, *supra* note 28, at 101.

that which is capable of it. Otherwise, publication of virtually any private matter could be rationalized and every aspect of the life of someone volunteering for public office would be fair game.

2. *Private Persons as Involuntary Public Figures.* One U.S. court has rationalized the lessened protection for public figures by saying that those who volunteer for public office waive much of their right to privacy.¹⁵⁸ What, then, of the person who is involuntarily thrust into the public eye? He or she has not acquiesced to the invasions of privacy suffered simply because he or she is somehow connected to a newsworthy event.

Some of the most apparently unfair decisions are the private facts cases that have involved involuntary public figures. Among these are the those who are rape survivors and others thrust into the spotlight because they have become a victim of a crime or otherwise involved in an event considered to be newsworthy.¹⁵⁹ The 1982 case of *Cape Publications, Inc. v. Bridges*¹⁶⁰ is illustrative. The plaintiff had been abducted by her estranged husband, taken to his apartment, and forced to disrobe. Hearing a gunshot the police, who by then had surrounded the apartment, stormed it, rushing the woman--clutching only a dishtowel to conceal her nudity--outside and into a police car. One of the news photographers who had gathered outside to document the breaking news story snapped several pictures of the woman en route to the car. In the photos, one of which was subsequently published by the defendant paper, the woman was naked, save the dish towel.¹⁶¹

¹⁵⁸ See, e.g., *Alim v. Superior Court*, 229 Cal. Rptr. 599 (Ct. App. 1986).

¹⁵⁹ For an excellent article on this issue, see Marc Franklin, *Legal Inhibitions on Reporting Fact*, supra note 127.

¹⁶⁰ 423 So.2d 426 (Fla. App. 1982), cert. denied, 464 U.S. 893 (1983).

¹⁶¹ *Id.* at 427.

Although the woman was awarded \$10,000 by the trial court, the state appellate court reversed on the grounds that the publication was a matter of legitimate public concern. In a callous statement, the court wrote that embarrassment or distress of the plaintiff could not justify suppression of publication of a matter otherwise newsworthy.¹⁶²

While I agree that the event was newsworthy and merited prominent and thorough coverage by the media, I fail to see how use of the photo of the naked woman contributed to this in any way except the most sensational or prurient. Any "edge" gained by running the nude photograph related to a circulation figure rather than to any true news value, and it in no way justified sacrificing the woman's dignity. A written description of the events, including the storming of the apartment and the rescue of the hostage in a state of undress, would have sufficed to inform the public and would have adequately conveyed the fast-breaking, crisis nature of the story.¹⁶³ To sensationalize the matter at the woman's expense was not only unethical from a journalist's perspective, publication of the photo was anything but newsworthy.

The opinion in the case provides interesting insights into what the court considered the issues to be, but it provides no excuse for their ignorance. Of the photograph, the court noted that it

revealed little more than could be seen had [plaintiff] been wearing a bikini and somewhat less than some bathing suits seen on the beaches. There were other more revealing photographs taken which were not published. The published photograph is more a depiction of grief, fright,

¹⁶² *Id.* at 428.

¹⁶³ See Nimmer, *From Times to Time*, *supra* note 84 (stating a similar argument).

emotional tension and flight than it is an appeal to other sensual appetites.¹⁶⁴

First, the fact that other more revealing photos were not used is plainly irrelevant.¹⁶⁵ Second, where the court got the notion that the amount of flesh revealed was at issue is inexplicable, and its subsequent admission that appeal to sexual appetites was not the plaintiff's concern is strangely at odds with its comparison to bikinis. How interesting, though, that the judge was able to articulate so clearly the crux of the image and yet remain oblivious to the harm caused by its publication. The lack of sympathy for the injury caused to the plaintiff by such a photo is simply startling.

The case of *Taylor v. K.T.V.B.*¹⁶⁶ provides an interesting comparison with *Cape Publications*. In *K.T.V.B.* the plaintiff was briefly shown nude in a film news clip of his arrest. He had answered the door nude when the police came to arrest him, and the television station cameras were rolling as he opened the door and was led from his home. The case was analyzed as a "publication of private facts" matter, and the appellate court remanded the case for a determination of whether defendant had acted with malice.

News media are immune from liability for reporting the details of an arrest without regard to the fact that this may result in the disclosure of embarrassing private facts about the arrestee unless it can be shown that the disclosure was made with malice. . . . Merely because one has been involved in an arrest, the news media should not be given the right to exploit the details of such an arrest for the purpose of holding the

¹⁶⁴ 423 So.2d at 427.

¹⁶⁵ Similarly, the fact that the photograph won industry awards, mentioned elsewhere in the opinion, *id.* at 427, is also irrelevant to the invasion of privacy question.

¹⁶⁶ 96 Idaho 202, 525 P.2d 984 (1974).

arrestee up to public ridicule and humiliation.¹⁶⁷

The relevance of "malice" is unclear, as it is a concept not commonly used in this aspect of a case's analysis. The definition stated for malice is "for the purpose of embarrassing or humiliating the arrestee, or with reckless disregard as to whether that disclosure will result in such embarrassment or humiliation."¹⁶⁸

The ruling is notable for its charity for the plaintiff, in this matter the "criminal" rather than, as in *Cape Publications*, the "victim." The Idaho court was willing to consider the possibility that the defendant television station had acted maliciously to embarrass or humiliate the male plaintiff, but the Florida court was not willing to consider the same possibility regarding the wholly innocent female plaintiff in *Cape Publishing*. If the malice standard had been utilized to scrutinize the Florida defendant's behavior, how could that defendant not have been guilty of "reckless disregard" as to whether the publication would result in the plaintiff's embarrassment or humiliation?

A cogent argument may be stated that the double standard evinced in *Cape Publications* and *K.T.V.B.* stems from stereotypes that tend to place women in the private sphere of the home, nature, sex, and irrationality, while situating men in the public sphere of the market, mind, politics, and rationality. Thus, when something private about a woman is revealed, it is not considered as shocking or as injurious as when a theretofore private aspect of a man's life is made public. In contrasting *Cape Publica-*

¹⁶⁷ *Id.* at 205, 525 P.2d at 986.

¹⁶⁸ *Id.* at 205 n. 1, 525 P.2d at 987 n. 1. In the scope of privacy cases, "malice" is really only used in false light cases, those most closely related to defamation. The similarity of the standard to that stated in *New York Times Co. v. Sullivan* is readily apparent. 376 U.S. 254 (1964).

tions with *K.T.V.B.*, we might infer that because we often see nude images of women and images of women as victims in private scenarios, these are not seen as offensive when they become public. We are not, on the other hand, so accustomed to seeing images of nude males, particularly frontal photographs. Accordingly, we are more likely to attribute legal injury status to such publications.

Courts have recognized the "aura of immediacy and . . . urgency" which a photograph contributes to a story.¹⁶⁹ As one court has written in defending use of a photograph depicting a bloodied plaintiff of a car accident, many editors would not cover an item at all if limited to copy only in doing so.¹⁷⁰ That same court's zealous defense of an editor's right to use photographs at the same time reveals a fatal flaw in the very rationale for doing so: "Some filmed or broadcast scenes compare to verbal reports in dramatic impact about as hearing music compares to reading a score" ¹⁷¹ Thus, this court at least admits that its justification for protecting media use of such pictorial images is related to "dramatic impact." But there is no bright line between dramatic impact and sheer sensationalism. Whereas in most instances publication of a truly newsworthy item is justifiable in spite of the consequent invasion of privacy, to aggravate the psychic injury inflicted by adding an element just for "dramatic impact" is not. To do so goes beyond the need to inform the public and all other arguments from the free speech position. To do so is to pander to the morbidity of the public at the expense of the wounded subject,¹⁷² and it

¹⁶⁹ See, e.g., *Gilbert v. Medical Economics Co.* 665 F.2d 305, 308 (10th Cir. 1981).

¹⁷⁰ See *Anderson v. Fisher Broadcasting Co., Inc.*, 300 Ore. 542, 712 P.2d 803 (1986).

¹⁷¹ *Id.* at 464, 712 P.2d at 810-11.

¹⁷² One court has expressly rejected the argument that the severity of the injury is relevant. In *Anderson*, 300 Ore. 542, 712 P.2d 803 (1986), the court said that the

illustrates the waning judicial sensitivity to matters of human dignity and personality.

These recent cases may be contrasted with older cases which showed a greater sensitivity to the aggravated damage caused by publication of photos and naming of names. In the 1942 case of *Barber v. Time, Inc.*,¹⁷³ a Missouri court upheld an award of damages to a woman who had been the subject of an article focusing on her eating disorder. Under the headline "Starving Glutton", the story told of the plaintiff's insatiable appetite and, inability in spite of it, to gain weight.¹⁷⁴ The story not only named the plaintiff, it also showed her photograph, taken without her permission.¹⁷⁵ After discussing the newsworthiness of a discussion of the unusual medical condition and noting the sanctity of doctor-patient confidentiality, the court stated that identity of the person who suffered the ailment was not a matter of public interest.¹⁷⁶ Furthermore,

"difference between undesired publicity by word or by picture seems to concern only the degree of the subject's psychic discomfort rather than the nature of the interest claimed to be invaded." *Id.* at 464, 712 P.2d at 811. The court said it perceived no distinction in principle between objections to a book based on one woman's experiences and objections to a motion picture based on another's. *Id.*

At this juncture, the court missed the point. It sought to draw support from the fact that *Cason v. Baskin*, 155 Fla. 198, 20 So. 2d 243 (1944), and *Melvin v. Reid*, 112 Cal. App. 285, 297 P.2d 91 (1931), had been considered indistinguishable. Both cases involving reportage of two different women's histories, the former in a book and the latter in a film. The fact that those were both historical, reflective publications destroys the attempt to illustrate that a film was no more damaging than a book. The current news event in *Fisher* is unlike either; accordingly the use of photo coverage in *Fisher* is inapposite to *Melvin v. Reid*.

¹⁷³ 159 S.W.2d 291 (Mo. App. 1942).

¹⁷⁴ *Id.* at 293.

¹⁷⁵ *Id.* at 295.

¹⁷⁶ *Id.* at 295.

"plaintiff's picture conveyed no medical information."¹⁷⁷ Even the defendant's representative conceded that "from a medical standpoint . . . it was not necessary to have her picture or her name . . . at all".¹⁷⁸ However, she admitted, "an attractive picture . . . of a young lady . . . attract[ed] reader's interest."¹⁷⁹

Another case recognizing the particular invasiveness of a photograph was *Daily Times Democrat v. Graham*.¹⁸⁰ The defendant published in his newspaper a photograph of plaintiff as she exited a "Fun House" at a rural county fair. The picture showed the plaintiff's dress blown up around her waist by the air jets in the floor as she left the attraction. Even though the photograph was taken in a public place, the court held that it was not a matter of "legitimate news" and therefore was actionable.¹⁸¹ The court wrote that

To hold that one who is involuntarily and instantaneously enmeshed in an embarrassing pose forfeits her right of privacy merely because she happened at the moment to be part of a public scene would be illogical, wrong and unjust.¹⁸²

One PCC adjudication relevant to the issues related to publication of a photograph arose from a newspaper's publication of a photograph of a missing boy's mother and her companion, contrary to their expressed wishes.¹⁸³ The

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ 162 So.2d 474 (Ala. 1964).

¹⁸¹ *Id.* at 477.

¹⁸² *Id.* at 478.

¹⁸³ Press Release No. 91-463/No. 30, Press Complaints Commission, 19 August 1991. See also Press Complaints Commission, Report No. 26, 14 (Aug.-Oct. 1994) (complaint upheld regarding photograph taken when complainants were

shot was taken while the photographer was trespassing, and the Commission upheld the complaint, stating that taking and publishing the picture was intrusive. The PCC analyzed the matter under Clause 9 of its Code of Practice, calling for "sympathy and discretion" in cases of personal grief, rather than under Clause 4 on Privacy. Other adjudications have established the distinction between photographing a person and photographing his or her home, usually finding the latter to be permissible.¹⁸⁴

3. *Revealing a Rape Survivor's Identity.* One mostly gender-specific "publication of private facts" issue which has become the subject of a great deal of recent commentary is the journalistic propriety of identifying a victim or survivor of a rape or other sexual assault. While the legality of publishing such information has been assured since 1975, the widely observed but unwritten ethical tenet

standing on private property by their front door with their baby in a push-chair).

¹⁸⁴ See, e.g., Press Complaints Commission, *Report No. 33, 24* (Jan.-March 1996) (publication of photo of house reported to be "unknown country hideaway of the Royal family" held not to be an invasion of privacy because "Clause 4 relates solely to pictures of people"); Press Complaints Commission, *Report No. 8, 6, 8* (April 1992) (publishing photo of David Sullivan's home, one of the largest in Britain, not an invasion of his privacy; rationale was that the building of the house was in the public interest because Sullivan had made his fortune in the pornography business). But see Press Complaints Commission, *Report No. 34, 22* (Apr.-June 1996) (publication of photo of lottery winner's home an invasion of privacy when accompanied by publication of address); Press Complaints Commission, *Report No. 18, 7* (May 1993) (publication of photo of the house of MP Ann Winterton added nothing to story about a planning matter related to security around her home; accordingly, the complaint in as much as it regarded the photo was upheld).

has been that the name of the survivor is not revealed.¹⁸⁵ Attention became focused on this issue in the wake of the decisions by the NBC television network and the *New York Times* to publish the name of the woman who accused William Kennedy Smith, nephew of U.S. Senator Edward Kennedy, of rape in the infamous Palm Beach incident in the spring of 1991.¹⁸⁶

Feminists are split in the debate over whether a rape survivor's name should be revealed. Many believe that treating rape differently from any other crime only perpetuates the stigma already attached to it. By failing to name names, we are saying that the rape survivor will be stigmatized if she is known, and we implicitly adhere to the ignoble notion that women are to blame.¹⁸⁷

¹⁸⁵ According to one source, of the 1600 daily newspapers in the United States, very few routinely publish rape victims' names. No industry organization/watchdog mandates this practice; the individual papers have decided for themselves, responding to community sensitivities. *Shield rape victims but invite names*, USA Today, International ed., April 5, 1991, at 6A. See also Franklin, *Legal Inhibitions on Reporting Fact*, *supra* note 127, at 128-31.

¹⁸⁶ See generally *Months before start of Smith rape trial, war declared for credibility*, Austin American-Statesman, Sept. 1, 1991, at A10, col. 1-2; Richard Morin, *When the Name is not a Game*, Washington Post Weekly, April 29-May 5, 1991, at 36, col.1-4. See also *Sounds of Silence*, Austin American-Statesman, Aug. 23, 1991; Helen Benedict, *When to Blame the Victim--The Media's Rules on Rape*, II Ms. 1, at p. 102 (1991) [hereinafter, Benedict, *Media's Rules*].

Even before the Palm Beach Kennedy incident hit the front pages, in the spring of 1991 the issue of identifying rape survivors became the focus of media attention. This occurred after Nancy Ziegenmeyer told the story of the attack on her, which had happened 18 months earlier, to *The Des Moines Register*. Ms. Ziegenmeyer was apparently motivated to make the disclosure in hopes that she could help remove some of the stigma associated with rape. See generally *Shield Rape Victims but Invite Names*, USA Today, International ed., April 5, 1990.

¹⁸⁷ See generally Karen DeCrow, *Stop treating victims as pariahs; print names*, USA Today, International ed., April 5, 1991, at 6A, col. 5. Of course, defamation law already stigmatizes rape victims in this way by holding

On the other hand, anyone who is a rape survivor or who has known intimately the trauma of one, knows that the issue is not so simple. The reality is that victims of sexual assaults are judged and stigmatized by many of those around them. Rather than providing an effective support system, friends, family, colleagues very often draw damning conclusions, even if they are unspoken or only subconscious. Asking these survivors to take responsibility for educating the public is in a great many cases (if not at all) asking them to impair their own healing process and to risk additional trauma.¹⁸⁸ The bottom line for most feminists is that it should be the individual survivor's decision.¹⁸⁹

a. United States Law. The germinal U.S. case addressing the collision between privacy interests and a free press in the context of publication of a rape survivor's identity is *Cox Broadcasting Corp. v. Cohn*.¹⁹⁰ The defendant in *Cox Broadcasting* telecast a report of a hearing for six youths who were accused of raping and murdering a girl. The report named the girl, and her father subsequently brought a common law action for damages, alleging invasion of his own privacy.¹⁹¹ Acknowledging the strong tide of

that to say falsely that a woman has been raped defames her. See Chapter 4 at Sect. IV.

¹⁸⁸ See generally Nancy Biele, *Don't pressure victims into disclosing names*, USA Today, International ed., April 5, 1990, at 6A, col. 5; Benedict, *Media's Rules*, supra note 186.

¹⁸⁹ See, e.g., Robin Morgan, *Whose Free Press Is It, Anyway?*, 11 Ms. 1, at 1 (1991).

¹⁹⁰ 420 U.S. 469 (1975).

¹⁹¹ *Id.* at 474-75. The father's plaintiff status in this case is noteworthy. Basically, he asserts that his privacy was invaded by publication of a statement that his daughter was raped. I have great difficulty with this because I see the crime as being such a personal one that the accompanying human dignity injury arising from another knowing is also intensely personal. Having a father claim invasion of his privacy smacks of his ownership of the

cases running in favor of privacy interests, Justice White, delivering the opinion of the Court, nevertheless recognized a media privilege to report on judicial proceedings, stating that they are "without question events of legitimate concern to the public and consequently . . . within the responsibility of the press to report."¹⁹² The Court noted that "even the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the public record."¹⁹³ By placing such information in the public domain on official court records, Justice White argued, the State must have concluded that a public interest was thereby served.¹⁹⁴

The *Cox Broadcasting* Court indulged itself in no substantive discussion of the privacy doctrine. "Public" was simply synonymous with what was in the public records, and since the sensitive information in question was within that category, the court never addressed the true meaning of "privacy." That is to say, it did not touch on the matter of human dignity, which Warren and Brandeis, along with many commentators since, have considered the touch-

daughter and is immensely offensive. How does it impact his dignity or self-esteem that his daughter was raped? This notion hearkens back to the days when a father could force a rapist to marry his daughter based on the theory that she was then used goods and could be pawned off on the rapist. See generally SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* (1975); SUSAN ESTRICH, *REAL RAPE* (1987).

¹⁹² *Id.* at 492.

¹⁹³ *Id.* at 494-95.

¹⁹⁴ *Id.* at 495. Interestingly, the Court declined to address the defendant's argument that they would have been privileged if they had obtained the information through their own investigation, rather than through public records. *Id.* at 497, n. 27.

stone of the cause of action.¹⁹⁵ The Court never acknowledged the special stigma associated with rape.¹⁹⁶

The *Cox Broadcasting* decision left unanswered the question of how it would have ruled had the information in contention not been a matter of public record. In 1989 the Court faced a similar question, but again avoided a definitive ruling. In *Florida Star v. B.J.F.*¹⁹⁷, the weekly paper in Jacksonville, Florida, in a one-paragraph story about a rape, named the victim. The reporter-trainee who prepared the story obtained the information from a police incident report, which she copied verbatim. Such reports usually did not mention the victim's name and in this case the inclusion of the name was apparently inadvertent. In fact, it was also the policy of the paper *not* to publish victims' names. Finally, a state statute made it unlawful to publish the name of a sexual offense victim.

The rape survivor sued both the local police department and the newspaper, quickly settling out of court with the former for \$2,500. The case against the newspaper went to trial, at which the woman testified about the emotional harm she had suffered as a result of her identification. Following the story's publication, the woman had received harassing phone calls and was even threatened with rape again. She had to move from her home and eventually required mental health counselling.¹⁹⁸ The trial court

¹⁹⁵ In all fairness, it must be noted that the Court quotes a long passage from Warren & Brandeis' landmark article. *Id.* at 487 n. 16. My point, however, is that the court never discusses nor applies what they and other commentators believed was at the heart of the action.

¹⁹⁶ Indeed, if the Court had considered this issue, it might well have found that the threshold test of offensiveness to a person of ordinary sensibilities was not met with regard to the actual victim's father, though I believe it should and would have been in regard to the victim herself, had she survived.

¹⁹⁷ 491 U.S. 524 (1989).

¹⁹⁸ *Id.* at 528.

awarded the woman \$75,000 compensatory and \$25,000 punitive damages; the state appellate court affirmed.¹⁹⁹ The U.S. Supreme Court reversed, 6-3, stating from the outset that *Cox Broadcasting* was not controlling. Whereas *Cox Broadcasting* had involved judicial records that were open to the public, the relevant records in *Florida Star* were expressly closed to public inspection. The Court held that a newspaper "lawfully obtain[ing] truthful information about a matter of public significance" will not be held liable in a civil or criminal case "absent a need to further a state interest of the highest order."²⁰⁰ Because the newspaper had obtained the information lawfully and because the Court did not attribute sufficient import to the state's interests in (a) the privacy of victims of sexual offenses, (b) their physical safety, and (c) the need to encourage them to report such crimes, the plaintiff was left without redress for the enormous blow to her self-esteem and sense of dignity, as well as for the harassment she suffered in the wake of the publication.

Some comments by Justice Marshall, writing for the majority, and Justice White, writing in dissent, are useful in highlighting some of the gender issues raised by cases like *Cox Broadcasting* and *Florida Star*. Justice Marshall used a seemingly innocuous clause of the Florida statute to help make a point that I have made discussed previously in a different context. He noted that the law was limited in its application only to the media, therefore failing to

¹⁹⁹ 499 So.2d 883 (Fla. App. 1986).

²⁰⁰ 491 U.S. at 533 (citing *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) (state statute making it a crime to publish names of juvenile offenders without court order was unconstitutional; state's interest in protecting anonymity of juvenile offenders insufficient state interest to justify law)).

Prior to *Florida Star*, some lower federal courts had elevated to the level of a "constitutional privilege" the media right to publish truthful information that is of legitimate public concern. See, e.g., *Campbell v. Seabury Press, Inc.*, 614 F.2d 395 (5th Cir. 1980).

redress instances where individual gossips maliciously tell the identity of the victim. He observed the paradox resulting from such a distinction in his recognition that "the communication of such information to persons who live near, or work with, the victim may have consequences equally devastating as the exposure of her name to large numbers of strangers."²⁰¹ While this would seem to indicate some degree of concern with a victim's plight, it should be noted that Marshall stated the argument as an attack on the Florida statute, as an argument intended to discredit it.

Justice White, who had written the Court's opinion in *Cox Broadcasting*, showed far greater sensitivity in his *Florida Star* dissent to the reality of a rape survivor's suffering and humiliation. In doing so, he clarified that Cox had turned on the public nature of the records. In his dissent, he expressed concern that the *Florida Star* outcome effectively "obliterate[d]" the private facts type of privacy suit, stating essentially that if a "wholly private" person cannot recover for publication of the fact she was raped, "I doubt that there remain any 'private facts' which persons may assume will not be published in the newspapers or broadcast on television."²⁰²

The *Florida Star* majority found such a newsworthy matter was constitutionally protected absent a need to further a state interest of the highest order.²⁰³ The majority found that no such state interest was established by Florida. The dissent, on the other hand, failed to reach the newsworthiness issue because it deemed the majority's cited precedent, which determined its rule, to be inapposite because privacy was not an issue there. The dissent did not address "newsworthiness" per se, but rather focused on the rape survivor's right to privacy and the State's desire, as expressed through the statute, not to

²⁰¹ 491 U.S. at 540.

²⁰² 491 U.S. at 551 (White, J., dissenting).

²⁰³ *Id.* at 541.

have the victim identified.²⁰⁴ Although the dissent did not draw an express distinction between publication of the crime and identification of the survivor, it never implied that the former, alone, was not fair game. The dissenters did, however, by implication, distinguish the naming of names from general coverage of the crime by writing

[I]t is not too much to ask the press, in instances such as this, to respect simple standards of decency and refrain from publishing a victim's name, address and/or phone number.²⁰⁵

The dissenters recognized that interests in informing the public may be served without humiliating a survivor by her identification. Why more jurists have not grasped this crucial distinction is an enigma to me, because a number of scholars have endorsed it. For example, comments by Melville Nimmer in a 1968 article support the position. In arguing that those who had involuntarily become part of a newsworthy event should not lose their right to privacy by virtue of that involvement, he wrote that

[I]f [a news] report does not reflect on the subject's reputation it cannot be said that the public interest, or that the factors which form the underlying rationale for freedom of speech, requires reporting the name or other identification of the subject of such private matters.[] In such circumstances the public's interest in news reporting is sufficiently served by an account of the event itself without identification of persons innocently involved.²⁰⁶

In the rape survivor context, Prof. Marc Franklin has distinguished cases where identification may be useful in

²⁰⁴ *Id.* at 549 (White, J., dissenting).

²⁰⁵ *Id.* at 547 (White, J., dissenting).

²⁰⁶ Nimmer, *From Times to Time*, *supra* note 84, at 966-67 (citing as support for his argument the state statutes which, at that time, prohibited naming of a female victim of a sexual offense).

solving the crime from the vast majority of cases, in which it is not.

b. English Law. The legal analysis accompanying publication of a rape victim's identity is somewhat different under English law. First, freedom of information laws as such are non-existent and non-statutory principles supporting access to information do not have the force which they have under U.S. law. Accordingly, just because a survivor's name is part of a court record, it is not necessarily known to the press. Criminal court proceedings are open to the public; thus a survivor's identity can become known to all in attendance, including the press. However, in 1988 a statute was adopted, expressly forbidding the publication of a survivor's identity in England or Wales.²⁰⁷ In 1992, the law was extended to protect the identities of victims of other types of sexual assault.²⁰⁸

One particularly interesting Press Council adjudication on press conduct in such matters involved the highly publicized Ealing vicarage rape. As has since become common knowledge, the survivor was the Vicar's daughter, Jill Saward.²⁰⁹ Just a few days after the rape, a *Sun* photographer took a photograph of Ms. Saward as she was en route to church. The paper subsequently published the photo, masking only her eyes with a black line. Her family argued to the Press Council that no doubt was left as to her identity and that the publication had caused great distress. The Council ruled that the paper's actions were "insensitive and wholly unwarranted intrusions into privacy at a time of deep distress for the subject and [served no]

²⁰⁷ SEXUAL OFFENDERS AMENDMENT ACT (1976), as amended by CRIMINAL JUSTICE ACT 1988. There is a general understanding in Scotland that the media do not identify rape victims. CALCUTT I REPORT, *supra* note 29, at § 10.9.

²⁰⁸ SEXUAL OFFENCES (AMENDMENT) ACT 1992.

²⁰⁹ Ms. Saward has since written a book about the rape, trial and ensuing events, including media treatment of the incident. See generally JILL SAWARD, RAPE: MY STORY (1990).

public interest."²¹⁰ Responding with no indication of remorse, the *Sun's* managing editor told the Council that it was simply presenting rape as a sordid crime and that the photos were useful in showing the victim's "ordinary, girl-next-door qualities."²¹¹ Even if one believes this excuse, it is no comfort, implying as it does that other survivors are not ordinary, even that most survivors are themselves somehow culpable by virtue of their lifestyle.

In a more recent matter, the Press Complaints Commission criticized a newspaper for publishing the name of a sexual assault victim, along with the "salacious" details of her attack.²¹² The report was made just before the Sexual Offences (Amendment) Act was extended to protect victims of sexual assault other than rape. The Commission found the publication to be a violation of the Code of Practice and noted that the same newspaper had been criticized for a similarly offensive publication earlier the same year.

4. *Privacy Regarding Other Sexual Matters.* An expectation of privacy has long accompanied sexual activity. This is true not only of Western societies, but anthropological evidence indicates that it has been the case in most cultures, from primitive to modern.²¹³ Perhaps stemming from these expectations, both Americans and Britons have long embraced the idea that a man's home is

²¹⁰ *The Press and the People*, 34th Annual Report of the Press Council (1987).

²¹¹ *Press Council: Ealing Vicarage rape case*, UK PRESS GAZETTE, March 9, 1987.

²¹² Press Complaints Commission, *Report No. 12*, 6 (Aug. 1992).

²¹³ BARRINGTON MOORE, JR., *PRIVACY: STUDIES IN SOCIAL AND CULTURAL HISTORY*, 67 (1984), *discussed in HIXSON, PRIVACY, supra* note 25, at ch. 1.

his castle.²¹⁴ The Fourth Amendment to the U.S. Constitution is the legal embodiment of this principle, as it prohibits many searches and seizures in one's home.²¹⁵

Other manifestations of the privacy right in American jurisprudence have also relied on this principle. The 1969 case of *Stanley v. Georgia*²¹⁶ is illustrative. The Supreme Court ruled in *Stanley* that a state statute prohibiting, among other activities, private possession of obscene materials was unconstitutional. Justice Marshall, writing for the Court, noted the "fundamental . . . right to be free . . . from governmental intrusions into one's privacy"²¹⁷, the "right to satisfy [one's] intellectual and emotional needs in the privacy of [one's] own home."²¹⁸ Rejecting the State of Georgia's argument that it should be able to protect an individual's mind from the effects of obscenity in the same way that it can protect his or her body from, for example, use of illegal drugs,²¹⁹ the Supreme Court stated that

²¹⁴ ROBERTSON, FREEDOM, INDIVIDUAL AND LAW, *supra* note 28, at 95; DAVID H. FLAHERTY, PRIVACY IN COLONIAL NEW ENGLAND 87-88 (1972) (quoting James Otis, a prominent Boston Attorney of the late 18th century), *discussed in* HIXSON, PRIVACY, *supra* note 25, at 13.

Interestingly, in the same 18th century time frame, one pastor whose remarks to his congregation are recorded encouraged them to be "faithful Monitors" of neighbors who have "done amiss". The clear implication is that religion was justified in interfering with an individual's privacy, consistent with its higher morality. HIXSON, PRIVACY, *supra* note 25, at 14.

²¹⁵ U.S. CONST. amend. IV. The very general rule of the fourth amendment is that such searches are proscribed unless the police authority has both "probable cause" and a warrant. Several exceptions to the rule have been recognized.

²¹⁶ 394 U.S. 557 (1969)

²¹⁷ *Id.* at 563.

²¹⁸ *Id.* at 565 (emphasis added).

²¹⁹ *Id.* at 560, 565-66.

If the First Amendment means anything, it means that a State has no business telling a man, *sitting alone in his own house*, what books he may read or what films he may watch.²²⁰

While the actual holding of *Stanley* was that criminalizing *private possession* of obscene materials is unconstitutional, the specific location of these materials in a private home clearly influenced the Court. Four times in the brief opinion, Marshall emphasized the setting: an individual's "own home"²²¹ or "own house."²²²

Constitutional regard for the privacy of a person's home has been undercut, however, in a couple of recent cases. In the 1986 sodomy case, *Bowers v. Hardwick*,²²³ the Court held, in a 5-4 ruling, that the Constitution does not confer a fundamental right for homosexuals to engage in acts of consensual sodomy. The fact that the act took place in the privacy of appellant Hardwick's bedroom failed to sway a majority of the Court.

In *Osborne v. Ohio*²²⁴ the Supreme Court upheld the constitutionality of a Ohio statute which proscribed possession or viewing of child pornography. Distinguishing *Stanley* by relying on the state's compelling interests in protecting the physical and psychological well-being of minors and in destroying the child pornography market,²²⁵ the Court also ruled against the appellant on an overbreadth argument.²²⁶ The purpose of the statute made all the difference in distinguishing *Stanley*.

²²⁰ *Id.* at 565 (emphasis added).

²²¹ *Id.* at 564, 565, 568.

²²² *Id.* at 565,

²²³ 478 U.S. 186, *reh'g denied*, 478 U.S. 1039 (1986).

²²⁴ 495 U.S. 103 (1990).

²²⁵ *Id.* at 108-11 (citing *New York v. Ferber*, 458 U.S. 747, 756-58, 761-62 (1982)).

²²⁶ *Id.* at 111-22.

These cases give some idea of the Court's attitude toward activities in one's home--and specifically sex-related activities--so that it is possible to put in perspective judicial handling of various media-related privacy issues which have somehow involved the sensitive subject of sexuality or sexual activities.

One rare private facts case--also related to sexuality--where the plaintiff prevailed even after the appeals were exhausted is the 1986 case *Hawkins v. Multimedia, Inc.*²²⁷ In an indisputably truthful story, the male plaintiff was identified as the father of an illegitimate child. The article naming him ran as a side-bar to a feature story about teenage pregnancies. The reporter obtained his name while interviewing one of the young mothers mentioned in the story, and the reporter subsequently engaged him in a very brief phone conversation.²²⁸ The reporter did not request permission to identify or quote him.²²⁹ The appellant newspaper apparently asserted plaintiff's consent as a defense, but the appellate court ruled that he had not consented because, even though he did not hang up the phone immediately, he was "very shy" and never agreed to his identification.²³⁰

The newspaper secondly defended its story on the grounds that the article was of "general interest."²³¹ The court, upholding the jury's finding on this issue, rejected appellant's argument, stating that the defense required "legitimate" public interest and expounding that "[p]ublic

²²⁷ 288 S.C. 569, 344 S.E.2d 145, cert. denied, 479 U.S. 1012 (1986).

²²⁸ *Id.* at ____, 344 S.E.2d at 146 (conversation reportedly lasted 3-4 minutes).

²²⁹ *Id.*

²³⁰ *Id.* The trial court below had ruled that, as a minor, he could not consent to an invasion of his privacy.

²³¹ *Id.*

or general interest does not mean mere curiosity, and newsworthiness is not necessarily the test."²³²

Finally, the court rejected appellant's argument that malice was a requirement for imposition of liability. The court deemed it relevant only for purposes of assessing punitive damages.²³³

It is hard to imagine, on the facts of this case, how the court ever reached the conclusion that a legally recognizable invasion had occurred. Compared to other "publication of private facts" cases--most with unsuccessful plaintiffs--publication of the fact that one fathered an illegitimate child is not a serious invasion of one's privacy. In the 1980s, it is neither violative of "community standards and mores" nor "highly offensive to a reasonable person", to quote two standards commonly applied in these cases.

Perhaps the most closely analogous case is *Meetze v. Associated Press*, a 1956 decision.²³⁴ The *Meetze* plaintiff was a twelve-year-old married girl who gave birth to a baby. The Associated Press ran a story in the local paper about the birth, reporting basic facts including the age of the mother and the fact that the baby was "fine and healthy."²³⁵ The story noted that the mother had declined repeated requests to be photographed and interviewed. Both the girl and her husband sued for invasion of privacy, arguing that they had been exposed "to an unwanted public light" and "public gaze" and "made the object of scorn and ridicule" because of the mother's youth.²³⁶ Finding that this was a matter of legitimate or public interest, and noting that the event, including the age of the parents,

²³² *Id.*

²³³ *Id.*

²³⁴ 95 S.E.2d 606 (1956).

²³⁵ *Id.* at 608.

²³⁶ *Id.*

was required to be entered as a public record, the court ruled in favor of the defendant news agency.²³⁷

Some would argue that the fact the young girl in *Meetze* was married and the young man in *Hawkins* was not is the salient distinction by which the cases can be reconciled. I disagree. If the South Carolina court in *Hawkins* was convinced that sufficient stigma attached to a teenage boy who fathered an illegitimate child in 1986,²³⁸ the same court could as easily maintain that an equal or greater stigma attaches to a birth given by one who is only a child herself in 1956, and therefore a greater humiliation and invasion was suffered by the girl. The greater protection afforded the privacy of the young man is, perhaps, attributable to his being male. Again, this seems consistent with female stereotypes whereby they are viewed as appropriately and naturally in the arena of giving birth. It is consistent with the natural function attributed to women in Western culture. As the *Meetze* court wrote and the *Hawkins* court quoted, "a twelve-year-old girl giving birth to a child was [a] 'biological occurrence which would naturally excite public interest.'"²³⁹ Apparently, all judges hearing both cases were oblivious to the fact that their language about "exciting public interest" was an implicit concession to the sensational aspect of the story, a sensationalism which, in the same breath, the *Hawkins* court disavowed as insufficient to justify a publication.²⁴⁰ I personally believe that *Hawkins* was decided wrongly and that *Meetze* was not, neither publication being sufficiently

²³⁷ *Id.* at 609-10.

²³⁸ The opinion never states his age, referring to him only as a "minor child" and "teenager." 344 S.E.2d at 146.

²³⁹ *Hawkins*, 344 S.E.2d at 146 (citing *Meetze v. Associated Press*, 230 S.C. 330, 95 S.E.2d 606, 610 (1956)).

²⁴⁰ *Id.*

personal to justify imposition of legal liability.²⁴¹ In addition, the facts in *Meetze* were a matter of public record. I simply use the *Meetze* case to illustrate one court's disparate treatment of men and women, a disparity that may be attributable to differing perceptions of what is "natural" or ordinary for them -- consistent with their nature -- and therefore what is insufficiently private to give rise to a cause of action.

B. False Light Invasion of Privacy

False light invasion of privacy is a particularly interesting tort for gendered analysis. Similar to defamation, the tort provides redress for publications which, while not defamatory in the sense of accusing one of immoral, improper or other bad conduct, portray a person in a way that embarrasses him or her. The germinal U.S. case is *Time, Inc. v. Hill*,²⁴² in which the defendant magazine presented as true a fictionalized account of the ordeal of a family held hostage by escaped convicts. Family members

²⁴¹ *Meetze* may be contrasted with a very early (pre-Warren & Brandeis) case, *DeMay v. Roberts*, in which the female plaintiff successfully sued a man who, by misrepresenting himself as a medical professional, was allowed to witness the plaintiff giving birth. 46 Mich. 190, 9 N.W.146 (1881). In finding for the plaintiff, the court wrote,

It would be shocking to our sense of right, justice and propriety to doubt even but that for such an act the law would afford an ample remedy. To the plaintiff the occasion was a *most sacred* one and no one had a right to intrude unless invited or because of some real and pressing necessity. . . . The plaintiff had a *legal right* to the privacy of her apartment at such a time, and the law secures to her this right by requiring others to observe it and abstain from its violation. . . . the wrong thus done entitles the injured part to recover the damages afterwards sustained, *from shame and mortification*. . . .

9 N.W. at 149 (emphasis added).

Under a Prosser system, *DeMay* would most likely have been characterized an intrusion case, not a publication of private facts case, of course.

²⁴² 385 U.S. 374 (1967).

were shown being subjected to various indignities that had not actually occurred. The article did not defame the family because it did not indicate that they had done anything wrong, but it did portray them in a false light in that it embarrassed them and was not true. The tort "rests on an awareness that people who are made to seem pathetic or ridiculous may be shunned"²⁴³ in the same way that those thought to be immoral are. As at least one judge has recognized, this would be a more appropriate tort to redress the injury caused when it is falsely reported that a woman has been raped. The woman has done nothing immoral or wrong (as technically required for the publication to be defamatory), but she is nevertheless embarrassed and injured by the disclosure.²⁴⁴

The reason that the false light tort makes for such interesting gendered analysis is that there are so many amorphous areas regarding gender and sexuality where the line between a disclosure that indicates bad conduct versus one that merely embarrasses is certainly not a bright one. Indeed, it seems to be one that changes with the sexual mores of a given time and may also vary greatly from place to place. The case of *Robyn Douglass v. Hustler Magazine, Inc.*,²⁴⁵ provides an excellent example. In that case, the plaintiff, an actress and model, had posed for a photo spread in Playboy magazine in 1974, before she became a successful television actress. Several years later, the photographer who took the photos for that spread sold some of the then-unpublished ones to Hustler magazine. He did so in spite of the fact that Douglass had not authorized him to do so. Douglass sued, asserting among other causes of action, false light invasion of privacy based on the

²⁴³ *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128 (7th Cir. 1985).

²⁴⁴ *Douglass*, 769 F.2d at 1132 (opinion by Judge Richard Posner).

²⁴⁵ 769 F.2d 1128 (7th Cir. 1985).

false implication from the photos that (1) she was a lesbian and (2) she was the type of woman who would pose for Hustler. After analyzing the photos of Douglass nude with another woman, one of which was described as "Douglass . . . straddling the other woman and the two appear[ing] to be engaged in sexual activity" the court, while dismissing the likelihood of such a finding, held that a jury could conclude that Douglass was a lesbian.²⁴⁶

As for the depiction of Douglass's association with Hustler, following a lengthy analysis of the differences between Playboy and Hustler (Douglass had, after all, voluntarily posed for Playboy in the past), the court stated that the implied association with Hustler was indeed embarrassing. The court therefore upheld Douglass's false light claim. The court noted that in the then-current moral climate, Douglass's posing for Hustler would not be considered immoral and therefore was not defamatory.

Interestingly, the court distinguished *Douglass* from another false light case that had involved the same publication. In that earlier case, *Brewer v. Hustler Magazine, Inc.*,²⁴⁷ a previously published photo of the plaintiff was

²⁴⁶ The court wrote:

Hustler is a magazine for men. Few men are interested in lesbians. The purpose of showing two women in apparent sexual embrace is to display the charms of two women. Moreover, the photos obviously are posed rather than candid shots; they show what the photographer wanted the women to do, not necessarily what the women wanted to do.

This portion of the judge's analysis seems to me to be wrong in some regards and to miss the point in others. First, I am not so sure that Hustler readers do not have fantasies related to lesbians. That is, the photos could serve as a masturbatory aid that cues to such fantasies. Secondly, I doubt the average Hustler reader, seeing the photo described above, would stop to think about the photographer posing the women. Rather, he would simply assume that the photo portrays the women authentically, as they choose to be.

²⁴⁷ 749 F.2d 527, 530 (9th Cir. 1984).

published in Hustler. In asserting his false light claim, the plaintiff did not argue that the magazine was degrading, only that it was explicit. The court noted that the photo in that case had been of the plaintiff pretending to shoot himself in the head. Unlike Douglass, he had therefore not been associated with the magazine's view of sex.

The most interesting thing about this case is that it illustrates the vagueness of the gradations between bad or immoral acts (implicating defamation) and embarrassing ones (implicating false light) in the context of sex and sexual matters. What might once have been considered immoral -- lesbianism and voluntarily posing for Hustler -- was, as of 1985, considered merely embarrassing. A decade later, a jury might not even find it embarrassing. The point is that these torts, where used in relation to sexual portrayals, change as sexual mores change. Because women are so often the plaintiffs in cases where an assessment of sexual morality is required, these shifting sands are significant, as they increasingly place portrayals of sexual morality out of the reach of legal redress.

VI. CONCLUSION

This chapter has discussed various gendered aspects of a broader cultural concept of privacy, of a narrower privacy legal doctrine, and of a still narrower privacy tort. Because both masculine and feminine aspects of each may be identified, it is difficult to be truly conclusive in discerning signals about cultural values from the rise and fall of the tort over the past century.

On one hand, virtually any way you look at it, the legal recognition of emotional or psychic injury is a positive step for what might be called feminine values, for it signals a greater sensitivity to feelings and, in turn, the relationships that grow and thrive when human dignity is maintained by protection of feelings. However, in recent years, what I consider the core type of privacy tort protecting these interests -- publication of private facts

-- has deteriorated in the hands of a judiciary faced with constitutional mandates about so-called "newsworthiness" and the inflexible mandate that whatever private matters are taken public to the extent they become matters of public record, lose all argument for maintenance of privacy. The cases involving identification of rape survivors are representative of the problems women face as legal sensitivity to the value of this sort of privacy wanes. Furthermore, related to this point, the argument that long-term interests of women, as well as society as a whole, are served by identification of survivors cannot be ignored. Perhaps MacKinnon's articulated goal of exposing the private as related to women's purported choice and freedom is worth the price to be paid by a number of particular women whose emotional or psychic well-being may be sacrificed in the process of achieving that goal.

Finally, it is interesting to see played out in so many privacy cases the reinforcement of traditional women's roles and images. The double standard identifiable in *Meetze versus Hawkins* corresponds to the prevalent stereotypes of women as characters in the natural, passionate, private realm of life, while that in *Cape Publications versus K.T.V.B.* highlights their frequent role as victims.

From a theoretical standpoint, it seems that the disposition of privacy law most favorable for women will be one that respects human dignity, including the desire for sexual privacy. Achieving this goal within a legal system will require some re-definition of the privacy concept, a re-definition sensitive to concepts of decision-making autonomy, an aspect of privacy that is so often denied women. In that way, the relational and communitarian goals often claimed by feminism can be served by a privacy concept that respects dignity interests, without allowing individualism to trump a greater, collective good.

The Gendered Critique of Obscenity Law

I. INTRODUCTION

Obscenity law traditionally has sought to accommodate the competing interests of free speech on the one hand and the protection of public morals on the other. Increasingly over the past two decades, another variable has crept into the equation: the harm to women that many believe pornography causes. This altered focus has stemmed from a growing concern that pornography¹--particularly the sado-masochistic, violent, or "hard-core" type--may directly (or indirectly) lead to sexual violence against women and that it, more generally, stereotypes women in a degrading and limiting way that impedes their quest for true and meaningful equality. The gender implications of the obscenity debate are more obvious than with any other area of free speech law because pornography is far more frequently exploitative of women than of men.² However, until 1992 when the Canadian Supreme Court ruled that obscenity is to

¹ The difference between "obscenity" and "pornography" is that the former is considered unprotected by the First Amendment to the U.S. Constitution. The latter refers to sexually explicit material that is not legally obscene and therefore receives First Amendment protection. See generally JOHN WATKINS, *THE MASS MEDIA AND THE LAW* ch. 9 (1990).

² For a broader discussion of the relationship between feminism and pornography see ALAN SOBLE, *PORNOGRAPHY: MARXISM, FEMINISM, AND THE FUTURE OF SEXUALITY* (1986); SUSAN GRIFFIN, *PORNOGRAPHY AND SILENCE: CULTURE'S REVENGE AGAINST NATURE* (1981); CAMILLE PAGLIA, *SEXUAL PERSONAE: ART AND DECADENCE FROM NEFERTITI TO EMILY DICKINSON* ch. 1 (1990); *RAPE AND REPRESENTATION* (Lynn A. Higgins and Brenda R. Silver, eds. 1991) (discussing more broadly the feminist implications of portrayal of women in literature); CATHERINE MACKINNON, *ONLY WORDS* (1993); CATHERINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987) [hereinafter MACKINNON, *FEMINISM UNMODIFIED*]; SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* (1975); *FEMINISM AND CENSORSHIP: THE CURRENT DEBATE* (Gail Chester and Julienne Dickey, eds. 1988); NADINE STROSSEN, *DEFENDING PORNOGRAPHY: FREE SPEECH, SEX AND THE FIGHT FOR WOMEN'S RIGHTS* (1995) [hereinafter, STROSSEN, *DEFENDING PORNOGRAPHY*].

be defined by the harm it does to women's pursuit of equality,³ no Western legal system had yet taken women and their welfare the starting point for imposing legal restrictions on pornography.

In the United States, where the free speech tradition is even stronger, the debate on pornography--even among feminists--has been much more intense. Under a bill considered by the U.S. Congress in July 1992, victims of sexual assault would have been allowed to sue pornographers if they could prove that obscene materials published by a given pornographer were a substantial cause of the assault.⁴ Even though the so-called Pornography Victims Compensation Act ("PVCA") would have required a plaintiff to prove that the material in question rises (or lowers!) to the constitutional obscenity standard -- material which receives no protection under the First Amendment -- the bill spawned enormous controversy in the United States. In the end, it progressed no further than a favorable committee vote in Congress.⁵

Pornography is indeed pervasive in Western culture -- enough so that if it is determined to be harmful to women and others, we may assume that the injuries are numerous and the harm widespread. The statistics regarding pornography are staggering. The Meese Commission, reporting in 1986, stated that in the previous three decades "the industry [had] gone from a low yield, covert business to a highly visible multi-billion dollar industry."⁶ Indeed,

³ See *Butler v. The Queen*, [1992] 1 S.C.R. 452 (1992).

⁴ See S. REP. No. 1521, 102d Cong. 1st Sess (1991); *discussed in USA Today*, April 15, 1992, at 9A (int'l ed.); Henry Reske, *Feminists Back Anti-Porn Bill*, June 1992, at 32-33; Daniel A. Cohen, *Compensating Pornography's Victims: A First Amendment Analysis*, 29 VAL U. L. REV. 285 (1994).

⁵ S. REP. No. 372, 102d Cong. 2d Sess. (1992).

⁶ U.S. Dep't of Justice, Att'y General's Comm'n on Pornography, Final Report 322-49 (1986) [hereinafter MEESE REPORT].

some statistics indicate that it is an \$8 billion a year business in the United States.⁷

Feminists have struggled for more than two decades to alter the politics of the pornography debate by focusing attention on its gender and civil rights implications.⁸ The movement has been especially active in the United States and in Canada.⁹ Since the early 1970s, scholars have been speculating about pornography's consequences for women, seeking to sensitize the public to fundamental relationships between sexuality and gender subordination. The link of violence to sex in much pornography (and for that matter, in other generally less repugnant media portrayals of women) has serious consequences for women,¹⁰

⁷ See Daniel Cohen, *supra* note 4; MACKINNON, FEMINISM UNMODIFIED, *supra* note 2, at 198. California Department of Justice statistics show that several years before 1984 pornography was a \$4 billion a year industry in the U.S. Introduction to TAKE BACK THE NIGHT 17 (Laura Lederer, ed. 1980) [hereinafter TAKE BACK THE NIGHT].

⁸ As Catharine MacKinnon has written, Obscenity law is concerned with morality, specifically morals from the male point of view, meaning the standpoint of male dominance. The feminist critique of pornography is a politics, specifically politics from women's point of view, meaning the standpoint of the subordination of women to men. Morality here means good and evil; politics means power and powerlessness. Obscenity is a moral idea; pornography is a political practice.
MACKINNON, FEMINISM UNMODIFIED, *supra* note 2, at 147.

⁹ The most recent notable Canadian development was the 1992 ruling of the Canadian Supreme Court in *Butler v. The Queen*, [1992] 1 S.C.R. 452 (Canada), referred to above. The Court upheld Canadian obscenity laws that embodied the MacKinnon-Dworkin concept of pornography and hence outlawed materials that "degraded" or "dehumanized" women. This ruling came in spite of the Court's acknowledgement that no evidence established conclusively any direct causal connection between pornography and discrimination or violence against women. *Id.* at 505.

¹⁰ See generally Diana E.H. Russell, *Questions We Get Asked Most Often*, in TAKE BACK THE NIGHT (Laura Lederer, ed. 1980) at 23; CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987); ANDREA DWORKIN, PORNOGRAPHY: MEN

and those concerned about these dangers have increasingly turned to the legal arena in their quest for a solution. These scholars have sought to politicize and make a legal issue of pornography's social construction of gender, a construction which they maintain leads to increased prevalence of sexual coercion and force. In Western legal systems, this campaign to heighten awareness of the sexual and gender implications of pornography is influencing the way in which we look at our regulation of such materials with existing obscenity laws. Many feminists argue that the law's focus should be shifted from one concerned with regulating society's morals from a Judeo-Christian stance to one concerned with gender image and equality issues. To understand more fully the significance and implications of this shift, it is helpful to consider the development and current state of obscenity laws of the United States and Britain.

II. THE ENGLISH LAW ON OBSCENITY

In 17th century England, most prosecutions under the common law crime of "obscene libel" were for bawdy attacks on the government and church, with little concern expressed about indecency for its own sake. However, at the turn of the 19th century, as sexually explicit materials became more widely distributed, concern rose among private groups and Parliament passed the Vagrancy Act of 1824 and Lord Campbell's Act of 1857. The former criminalized the publication of indecent pictures; the latter authorized the seizure and destruction of obscene materials.¹¹

The early landmark English decision construing the meaning of "obscenity" came in *Regina v. Hicklin*,¹² when Lord Cockburn CJ of the Queen's Bench first attempted to define what material was obscene and therefore proscribed.

POSSESSING WOMEN (1987).

¹¹ See generally WATKINS, *supra* note 1, at ch. 9.

¹² [1868] LR 3 QB 360.

Lord Cockburn CJ stated the now familiar test as whether the material in question had a tendency "to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."¹³ The offensive part of a given work was scrutinized in isolation; any literary or other merit of the work as a whole was considered irrelevant. Furthermore, proof of scienter was not required, the requisite improper motive of the author/publisher being implied if the work in question was determined to be obscene.

The *Hicklin* obscenity test had a far-reaching impact on the law, remaining the foremost statement of English law for more than a century, while also profoundly influencing developing American law. The first significant reform of *Hicklin* came in 1959 with Parliament's passage of the British Obscene Publications Act. It states the relevant test as the tendency "to deprave and corrupt persons who are likely, having regard to all circumstances, to read, see or hear the matter"¹⁴ Thus, under English law, "obscenity" is determined according to a single variable: the response of a particular audience. Currently, the relevant audience is the likely readership or viewership of the material. This principle was reiterated in *DPP v. Whyte*,¹⁵ when the "tendency to deprave and corrupt" formula again assumed a central role in the obscenity determination

¹³ *Id.* at 371.

¹⁴ OBSCENE PUBLICATIONS ACT 1959, § I (I). The commercial motive of the pornography publisher is considered wholly irrelevant under Section 2 of the Act.

¹⁵ [1972] AC 849, *discussed in* ERIC BARENDT, FREEDOM OF SPEECH 256 (1985). Barendt additionally comments that the majority of Lords clarified that the purpose of the 1959 Act was not only to prevent corruption of the mind, but also to stop those already depraved from further corruption. Thus, if the audience for the material are those who are "addicts" to such material and, accordingly, already corrupted, the material may still be deemed obscene. *Id.* at 257.

process; a prerequisite finding that a publication is "offensive" or "indecent" is implicitly superfluous.

Many have criticized the 1959 Act and its progeny for retaining the rather nebulous concept of corruption. Both judges and commentators have posited that offensive material is in reality often assessed under contemporary standards rather than merely by its propensity to cause depravity and corruption.¹⁶ Contrary to this speculation, there remains in Britain something of an anomaly of obscenity law: the defense that a publication may be so repulsive that it causes not corruption, but rather an aversion to the disgusting acts depicted. Such a defense obviously would be inappropriate--as it is in the United States--if the evil to be averted is the general indecency or offensiveness of the material rather than the response of the consumer.

In 1987, the British Parliament considered a bill that would have adopted a different starting point for defining obscenity--a concept akin to U.S. law in that, in making the obscenity determination, it would look to a reasonable person's assessment of the material as "grossly offensive" or not. Consideration of a tendency to "deprave or corrupt" would have become obsolete.¹⁷ The bill did not pass, and some applauded its failure, fearful that its passage would have made for even more uncertainty because no one can know what will dismay some hypothetical reasonable person.¹⁸

¹⁶ *Id.* at 257 (referring to comments made by members of the Lords and the Williams Committee).

¹⁷ See GEOFFREY ROBERTSON, *FREEDOM, THE INDIVIDUAL AND THE LAW* 194-95 (6th ed. 1989) [hereinafter ROBERTSON, *FREEDOM, INDIVIDUAL AND LAW*].

¹⁸ See ROBERTSON, *FREEDOM, INDIVIDUAL AND LAW*, *supra* note 17, at 195. Interestingly, a commentator with an entirely different perspective for the most part, Catharine MacKinnon, has also rejected this standard. Her point, however, is that those making the "reasonable person" judgment call will not be gender neutral and, in fact, will most often be male. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note

Another suggestion for law reform had been made in 1979 in the Williams Committee Report,¹⁹ the product of a Home Office Committee chaired by philosopher Bernard Williams. As one commentator has described the report, it set aside the "siren slogan of 'free speech'" because the material being considered was "ideologically vapid and wholly lacking in communicative content."²⁰ The guiding philosophy of the report was that conduct should not be suppressed unless it presents a likelihood of harm to others.²¹ The committee concluded, however, that no such harms were threatened except when persons under the age of 16 were exploited in the production of the pornography.²²

III. THE UNITED STATES' LAW ON OBSCENITY

The starting point for analysis of obscenity under U.S. law is with the First Amendment to the U.S. Constitution, which provides that Congress shall make no law "abridging the freedom of speech, or of the press."²³ The word "speech" has long been considered a term of art, with a specific meaning in this context.²⁴ Implicit in its use is the assumption that certain communications, including

2, at 164, 174.

¹⁹ Report of the Committee on Obscenity and Film Censorship, HMSO (1979) Cmnd. 7722 [hereinafter Williams Committee Report].

²⁰ ROBERTSON, FREEDOM, INDIVIDUAL AND LAW, *supra* note 17, at 197; see also Cass Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 807-08 (1993) (calling much pornography not an appeal to ideas, but mere masturbatory aids); Schauer, *Speech and "Speech,"* *infra* note 24, at 923-24.

²¹ ROBERTSON, FREEDOM, INDIVIDUAL AND LAW, *supra* note 17, at 197 (discussing the Williams Committee Report).

²² *Id.* at 198.

²³ U.S. CONST. amend. 1.

²⁴ See, e.g., Frederick Schauer, *Speech and "Speech"--Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899 (1975).

obscene ones, are not "speech" for purposes of the First Amendment and therefore are not accorded its protections.²⁵ While the assumption has been criticized by some commentators as fallacious,²⁶ as a practical matter the critical legal enquiry remains: What is "obscene" and therefore not protected as "speech"?

Prior to the U.S. Supreme Court's addressing the matter of obscenity as one with constitutional implications, the various states had enacted regulations of their own indicating what was or was not obscene. State legislation aimed at obscene publications was first enacted in the mid-1800s, about the time that the U.S. Congress first addressed the problem at the federal level with the Customs Act of 1842.²⁷ Other early efforts included the Comstock Act, passed by Congress in 1873, which sought to control the proliferation of obscene materials by prohibiting mail carriage of a wide variety of "obscene, lewd or lascivious" materials. Most early judicial opinions embraced the Hicklin standard for determining obscenity, but its influence began to wane in the 1930s after a federal district judge, making an obscenity determination about James Joyce's *Ulysses*, fashioned a new test in *United States v. One Book Called "Ulysses."*²⁸ The test inquired about a work's tendency to "stir the sex impulses" in a person having "average sex instincts," and it considered the

²⁵ In the obscenity context, the relevant ruling came in *Roth v. United States*, 354 U.S. 476 (1957). Prior to that, the principle was articulated in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). Other communications that are speech in a literal sense but not in a constitutional sense include communications violative of antitrust laws and perjurious statements.

²⁶ See, e.g., Steven Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 MICH. L. REV. 1564 (1988).

²⁷ See generally WATKINS, *supra* note 1, at 359.

²⁸ *United States v. One Book Called "Ulysses"*, 5 F.Supp. 182 (S.D.N.Y. 1933), *aff'd* 72 F.2d 705 (2d Cir. 1934).

author's intent, as well as the work taken as a whole rather than discrete parts only.

Twenty years later, the first Supreme Court pronouncement on obscenity, *Roth v. United States*²⁹--greatly influenced by the *One Book Called "Ulysses"* ruling--ended *Hicklin's* influence once and for all. Justice Brennan, writing for the Court, explained that "sex and obscenity are not synonymous" and that portrayal of sex does not, in and of itself, remove a work from the scope of First Amendment protection. In attempting to establish a national definition of obscenity, Justice Brennan stated the relevant question as "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest," the latter phrase defined as "a shameful or morbid interest in nudity, sex, or excretion."

In subsequent years, the Court struggled to refine the *Roth* test as it applied the standard in a variety of cases. One significant plurality decision, *Memoirs v. Massachusetts*,³⁰ dramatically narrowed *Roth* by imposing two more elements requisite to a determination of obscenity: (1)"patently offensive" affront to contemporary community standards and (2)"utterly without redeeming social value." Under this standard, material with even the least bit of social value was granted protection, so that it was almost impossible for material to run afoul of obscenity law under the tightened *Memoirs* requirements.

Frustrated by their inability to reach a majority, let alone a consensus definition, for several years following *Memoirs* the Justices applied their own individual standards to the obscenity appeals they heard -- and saw. The Court issued no opinions, only reversals of convictions under state criminal statutes, as appropriate. Meanwhile, in

²⁹ 354 U.S. 476 (1957) (companion case, *Alberts v. California*).

³⁰ 383 U.S. 413 (1966).

1969, the Court declared unconstitutional a state statute that made criminal the knowing possession of obscene matter. The Court in *Stanley v. Georgia*,³¹ discounted Georgia's asserted interest in protecting "the individual's mind from the effects of obscenity" and referred to the constitutional recognition of "man's spiritual nature" and the individual's right to "their beliefs, their thoughts, their emotions, and their sensations."³² The majority denied the relevance of the fact that "obscene materials . . . are arguably devoid of any ideological content. The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all."³³ The Court concluded with this oft-quoted passage:

If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.³⁴

The opinion includes no hint of an acknowledgement that anything other than morality and the individual's right to think are at issue in the case.

It was not until 1973 that a majority of the Supreme Court again agreed a test for what constituted obscenity. In *Miller v. California*³⁵ a majority of the Court endorsed a three-prong test which is still used 20 years later. Part one considered whether the "average person, applying

³¹ 394 U.S. 557 (1969).

³² *Id.* at 564-65 (citing *Olmstead v. United States*, 277 U.S. 438 (1928) (Brandeis, J., dissenting)).

³³ *Id.* at 566.

³⁴ *Id.* at 565.

³⁵ 413 U.S. 15 (1973).

contemporary community standards" would find that the work, considered as a whole, appeals to prurient interests. Chief Justice Burger clarified that "contemporary community standards" referred to local rather than national standards.³⁶

Part two asked whether a work depicts or describes in a "patently offensive way" sexual conduct specifically defined and prohibited by the relevant state law. Examples of such representations or depictions, regulable by states, included those "of ultimate sexual acts, normal or perverted, actual or simulated" and "of masturbation, excretory functions, and lewd exhibition of the genitals."³⁷ The Court's subsequent commentary on the "patently offensive" element has equated it with "hard-core pornography."³⁸ For example, explicit photographs of heterosexual and homosexual intercourse, fellatio, cunnilingus, masturbation, bestiality, and group sex have been deemed patently offensive. Mere nudity is not. Moreover, while the jury has wide latitude to make these factual determinations, the jurors' discretion is not completely unfettered, and on rare occasions their decisions have been reversed.³⁹

Finally, under part three of *Miller*, the jury is to consider whether the material in question, again taken as a whole, lacks serious literary, artistic, political, or

³⁶ *Id.* at 35. Subsequent cases have provided further instruction. The "community" may be the city, county or even state. Under federal obscenity statutes, it is the geographic area from which jurors are selected for the federal court. Although expert testimony as to patent offensiveness and community standards is permissible, the jurors themselves are considered to be in the best position to make the determinations, and they are the final arbiters. See generally *WATKINS*, *supra* note 1, at 362-63; see also *Jenkins v. Georgia*, 418 U.S. 153 (1974).

³⁷ *Miller*, 413 U.S. at 24.

³⁸ *Hamling v. United States*, 418 U.S. 87 (1974).

³⁹ See, e.g., *Jenkins v. Georgia*, 418 U.S. 153 (1974) (reversing a Georgia court's affirmance of a jury finding that Mike Nichols' film *Carnal Knowledge* was obscene).

scientific value.⁴⁰ This is an objective test that is not supposed to vary from one community to another.⁴¹

Although *Miller* and its progeny have provided a good deal of information about what is and is not obscene, linguistic imprecision precludes total clarity regarding that division. The problem is exacerbated by the extensive discretion given to juries under *Miller* so that would-be publishers have insufficient guidance on which to make their decisions. Little has changed in the U.S. law on obscenity since *Miller*.⁴²

Like the Williams Report in Great Britain, special studies have, from time to time, been commissioned in the United States. The most recent was the 1986 Meese Report⁴³ which concluded -- controversially -- that sexually violent pornography "bears a causal relationship to anti-social acts of sexual violence and, for some subgroups, possibly unlawful acts of sexual violence." In spite of this finding, nothing legislatively or judicially ever came of the Meese Commission's findings.

IV. THE FEMINIST CRITIQUE OF OBSCENITY AND PORNOGRAPHY

There is no single "feminist" position on pornography. Indeed, feminists are perhaps more deeply divided on the pornography issue than on any other. For purposes of pornography critique, however, feminists might loosely be categorized as either "radical" or "liberal."

A. *Radical Feminists.*

Radical feminists believe that gender, the social construction of biological sex, is not about sameness and

⁴⁰ *Miller*, 413 U.S. at 24, 27.

⁴¹ *Pope v. Illinois*, 481 U.S. 497 (1987).

⁴² *But see Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (upholding an Indiana statute that required otherwise nude dancers to wear pasties and G-strings).

⁴³ See *supra* note 6.

difference, but rather about a hierarchy of power.⁴⁴ Pornography, they posit, "eroticizes hierarchy . . . sexualizes inequality."⁴⁵

The radical feminists, amongst whom Catharine MacKinnon is the best known and probably the most controversial lawyer, agree that obscenity should not be protected by the First Amendment. They believe, however, that the obscenity doctrine in constitutional jurisprudence is inadequate to protect women against the pervasive harm of the myriad pornographic images that remain legitimized by the free speech principle. Pornography, these feminists say, endorses the sexual and social inferiority of women.

MacKinnon argues that the legal fiction stating that obscenity is not "speech," as that word is used in the First Amendment, allows avoidance of the need to scrutinize pornography's social etiology. While, she notes, the law considers obscenity "deviant, antisocial" because the harm it can cause is manifested in acts against the social order,⁴⁶ the radical feminist perspective holds that pornography is the "essence of a sexist social order."⁴⁷ While the constitutional obscenity doctrine makes judgments about good and bad, right and wrong, it ignores the concrete and substantive reality of what pornography is and does to women.⁴⁸

⁴⁴ See *supra* Chapter 2 at Sect. V (discussing radical feminism).

⁴⁵ MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 2, at 172; see also CATHERINE MACKINNON, *ONLY WORDS* (1993).

⁴⁶ MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 2, at 154 (citing *The Report of the Commission on Obscenity and Pornography* (1970) (majority view)). Interestingly, in the 1973 decision in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 60-61 (1973), Justice Burger, writing for the majority noted the lack of conclusive proof of a connection between antisocial behavior and obscene material.

⁴⁷ MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 2, at 154.

⁴⁸ MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 2, at 175.

The best known legal attempt by U.S. feminists (and arguably the most successful to date) to have their concerns addressed is the MacKinnon-Dworkin ordinance, adopted by the Indianapolis City Council in 1984.⁴⁹ Although it subsequently was declared unconstitutional,⁵⁰ the attention that the ordinance received and the debate that it engendered have, I believe, had a net positive effect on the attempts of feminists to focus legal communities and the general public on pornography's impact on women.

The ordinance, seeking to focus on the sex discrimination portrayed and arguably encouraged by pornography, established a private civil rights violation for those

⁴⁹ The ordinance defined pornography as [T]he graphic sexually explicit subordination of women through pictures and/or words that also includes one or more of the following: (i) women are presented dehumanized as sexual objects, things, or commodities; or (ii) women are presented as sexual objects who enjoy pain or humiliation; or (iii) women are presented as sexual objects who experience sexual pleasure in being raped; or (iv) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or (v) women are presented in postures of sexual submission, servility or display; or (vi) women's body parts--including but not limited to vaginas, breasts, buttocks--are exhibited, such that women are reduced to those parts; or (vii) women are presented as whores by nature; or (viii) women are presented being penetrated by objects or animals; or (ix) women are presented in scenarios of degradation, injury, torture, shown as filthy or inferior, bleeding, bruised or hurt in a context that makes these conditions sexual.

Catharine MacKinnon, *Pornography, Civil Rights and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, n.1 (1985). This is the text of the original ordinance drafted by MacKinnon and Dworkin, at the request of the city of Minneapolis, Minnesota. It was amended slightly when adopted by the Indianapolis City Council. *Id.*

⁵⁰ *American Booksellers Association, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd without opinion*, 475 U.S. 1001 (1986) [hereinafter *Hudnut II*].

injured by pornographic material.⁵¹ Its practical approach, less abstract and more pragmatic than current legal definitions of obscenity, was more concerned with subordination and dominance on the basis of sex than with Judeo-Christian morality issues. The Indianapolis version of the ordinance summarized the findings of the city council as follows:

Pornography is a discriminatory practice based on sex which denies women equal opportunities in society. Pornography is central in creating and maintaining sex as a basis for discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it promotes, with the acts of aggression it fosters, harm women's opportunities for equality of rights in employment, education, access to and use of public accommodations, and acquisition of real property; promote rape, battery, child abuse, kidnapping and prostitution and inhibit just enforcement of laws against such acts; and contribute significantly to restricting women in particular from full exercise of citizenship and participation in public life, including neighborhoods.⁵²

The MacKinnon-Dworkin ordinance was purposely gender-neutral according to its drafters, recognizing that men, children, or transsexuals also could be "used" in pornography. In spite of this neutrality, the ordinance was found unconstitutional partly because the court considered it to

⁵¹ American Booksellers Ass'n, Inc. v. Hudnut, 598 F.Supp. 1316, 1320 (S.D. Ind. 1984) [hereinafter *Hudnut I*] (quoting the relevant part of the ordinance). The recognized ways in which people could be injured included trafficking in pornography, coercion into pornographic performance, forcing pornography on a person, and assault or physical attack due to pornography. *Id.* at § 16-15. The procedures provided for complaints for these practices, to be followed by investigation and conciliation. *Id.* at §§ 16-17, 24.

⁵² INDIANAPOLIS IND. CODE § 16-1 (a) (2) (1984), in *Hudnut I*, 598 F.Supp. at 1320.

be a content-based regulation on speech,⁵³ a type of regulation long disallowed under First Amendment precedent.⁵⁴ As the *Hudnut II* court wrote, "The state may not ordain preferred viewpoints The Constitution forbids the state to declare one perspective right and silence opponents."⁵⁵ In essence, the Seventh Circuit declared the expression of female inferiority a protected viewpoint.

The courts also objected to the ordinance because of its inconsistency with the *Miller* precedent, making no allowance for works of serious literary, artistic, political or scientific value, failing to consider "community standards" and stating too broad a definition of "obscenity."⁵⁶ The district court considered the ordinance to be unconstitutionally vague and therefore as providing insufficient notice to pornographers of what was and was not unlawful.⁵⁷

⁵³ *Hudnut II*, 771 F.2d at 331.

⁵⁴ At least one commentator believes that the Supreme Court has, during the 1980s, cast doubt upon its content barrier. David Kairys has noted the Court's holding that a content restriction on speech can be constitutional if its purpose is to achieve some legitimate secondary effect, like traffic congestion or litter. David Kairys, *Freedom of Speech*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (Rev'd ed. 1990) (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Boos v. Barry*, 458 U.S. 312 (1988) (plurality opinion extending "secondary effects" analysis to political speech)). But see *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538 (1992) (striking down as unconstitutional a city ordinance that applied to persons who publicly displayed a symbol, such as a burning cross, which they had reason to know would cause racially based anger or alarm; Court said government could regulate inflammatory speech or "fighting words" as a class, but government could not pick and choose among particular kinds of fighting words so as to favor certain messages -- here non-racially inflammatory fighting words -- over others.)

⁵⁵ *Hudnut II*, 771 F.2d at 325.

⁵⁶ *Id.* at 324-5.

⁵⁷ *Hudnut I*, 598 F.Supp. 1337-39.

A number of commentators have followed up on the MacKinnon-Dworkin statute's rejection on First Amendment grounds, proposing ordinances of their own. These purport to share MacKinnon and Dworkin's concern about women but attempt to circumvent the constitutional obstacles identified in *Hudnut*. Some of these proposals would no doubt be considered sell-outs by MacKinnon and Dworkin, as they arguably gut the essence of the ordinance, undermining its usefulness for women. Several of these proposals have, nevertheless, offered practical suggestions worthy of note.

Continuing to recognize the benefit of conferring a private right of action to women harmed by pornography, one proposal by Martin Karo and Marcia McBrian provides, in addition to state criminal sanctions, that individual women may sue in tort for damages caused them by pornography.⁵⁸ As the authors of this proposal have noted, American tort law has never been hasty to allow recovery for unproven or petty affronts, and the requirement that real damages be proven also protects against frivolous and excess litigation. On the other hand, the threat of civil action and consequent damage payments to successful plaintiffs may effectively curtail pornographers' activity.⁵⁹ *Hudnut* concerns about overwhelming court dockets and the impetus that might be provided to other groups to utilize similar legislation to their own ends are also addressed by the authors. Karo and McBrian note that seeking legal redress for injury is a fundamental right and one not to be denied out of administrative concern. Just as there is no blanket prohibition on *habeas corpus* petitions because many people

⁵⁸ See Martin Karo and Marcia McBrian, *The Lessons of Miller and Hudnut: On Proposing a Pornography Ordinance that Passes Constitutional Muster*, 23 MICH. J. OF L. REF. 179, 205 (1989); see *supra* notes 4-5 (discussing the Pornography Victims Compensation Act).

This would be a type of action consistent with feminism's "social injury approach." See *supra* Chapter 2 at Sect. IX.

⁵⁹ *Id.*

wish to file them, none should exist to ban civil rights suits by women harmed by pornography.⁶⁰ As for the use of legislation to further a political cause, the authors note that the narrower issue is the safety of women, and an ordinance drafted restrictively to address this issue does not abuse the legislative process.⁶¹

Karo and McBrian would address the overbreadth of the MacKinnon-Dworkin ordinance by adopting an "obscenity" definition consistent with *Miller*.⁶² They do not consider such consistency with existing law to be only a concession for practicality's sake. In fact, they endorse the *Miller* "literary, artistic, political, or scientific value" test, noting that if there is any such value in a given work, it must be balanced against the harms caused. The "jury ought to have latitude to determine that a material's harm is mitigated by its benefits."⁶³ Of course, many feminists would disagree with such an exception, arguing that explicit and degrading novels and works of art which we not only take seriously, but even study and revere, cause as much or more harm as materials considered to have no such redeeming value.

Furthermore, Karo and McBrian suggest that terms used in the ordinance should be defined or self-defining so as to provide notice of potential criminal liability for those who might run afoul of the law.⁶⁴ Additionally, "politi-

⁶⁰ *Id.* at 210.

⁶¹ *Id.*

⁶² *Id.* at 205.

⁶³ *Id.* at 208 (citing MEESE REPORT, *supra* note 6, at 265).

⁶⁴ *Id.* at 210-11. Although Karo and McBrian object to use of terms such as "subordination of women", "fragmented or severed into body parts" and "servility" in the MacKinnon-Dworkin ordinance, similar arguments could be made about the use of most key terms in the *Miller* decision. Much of the difficulty can be attributed to the unavoidable imprecision of our language.

cally charged" terms should be avoided. Karo and McBrian recognize that characterizing pornography as a political issue alters the First Amendment implications, making it that much more difficult to justify legal regulation or prohibition of the harmful materials.⁶⁵

Finally, the Karo-McBrian proposal would provide for prospective or declarative rulings, justified by the premise that the harms pornography causes can be prevented: The avoidance of injury to women, not after-the-fact punishment of offending pornographers.⁶⁶ Thus, prospective rulings are a reasonable device and are useful for accommodating free speech concerns.⁶⁷

Other proposals, presented as alternatives to the MacKinnon-Dworkin ordinance, have focused more on the distinction between violent and non-violent pornography, suggesting the prohibition exclusively of the former.⁶⁸ These scholars tend to believe that the MacKinnon-Dworkin ordinance achieved nothing by trying to do too much, and they have focused upon the research which supports a correlation between violent pornography and men's aggression toward women.⁶⁹ Although no complete consensus exists amongst researchers, they generally have agreed that the

⁶⁵ *Id.* at 212.

⁶⁶ *Id.* at 211.

⁶⁷ *Id.* at 211 (citing *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 55 & n.4 (1973); *McKinney v. Alabama*, 424 U.S. 669, 679 (1975) (Brennan, J., concurring); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 442-44 (1957) (upholding New York statute allowing limited prior restraints in seizing obscene materials prior to trial); *Sunshine Book Co. v. Summerfield*, 249 F.2d 114, 118-19 (D.C. Cir. 1957) *rev'd*, 355 U.S. 372 (1958)).

⁶⁸ See generally Deanna Pollard, *Regulating Violent Pornography*, 43 VAND. L. REV. 125 (1990); Note, *Violent Pornography and the Obscenity Doctrine: The Road Not Taken*, 75 GEO. L. J. 1475 (1987).

⁶⁹ See generally MEESE REPORT, *supra* note 6, at 322-49.

resultant harms are (1) harmful social conditioning and (2) violent acts resulting from pornography consumption.⁷⁰

Responding to such research, one proposal by Deanna Pollard draws on both obscenity law and principles related to incitement to illegal activity. Under the law related to the latter, the Supreme Court has held that speech advocating lawless activity may be suppressed under some circumstances. Specifically, the 1969 case of *Brandenburg v. Ohio*⁷¹ allowed such infringement of free speech rights if two conditions were met: (1) the advocacy tends to produce lawless action and (2) a likelihood of imminent harm exists.⁷² Pollard argues that such conditions are met with regard to violent pornography if an objective foreseeability standard is used in relation to the intent requirement and, accordingly, its suppression is constitutionally justifiable.⁷³

As for use of obscenity law to punish purveyors of violent pornography, Pollard argues that "the reasons underlying the obscenity exception [to First Amendment protection] apply to violent pornography with equal or greater force than to material that excites lust or lewdness."⁷⁴ Accordingly, she would justify the inclusion of all violent pornography within the constitutional obscenity exception.⁷⁵

⁷⁰ See Pollard, *Regulating Violent Pornography*, *supra* note 68, at 130 (citing Linz, Penrod & Donnerstein, *The Attorney General's Commission on Pornography: The Gaps Between the "Findings" and Facts*, 1987 AM. B. FOUND. RES. J. 713, 719)).

⁷¹ 395 U.S. 444 (1969).

⁷² *Id.* at 447.

⁷³ Pollard, *Regulating Violent Pornography*, *supra* note 68, at 139-43.

⁷⁴ *Id.* at 145.

⁷⁵ *Id.*

Pollard acknowledges the constitutional flaws of the MacKinnon-Dworkin ordinance and introduces a proposal of her own which might avoid these. Her ordinance would cover only those materials concurrently depicting sexual explicitness and violent acts, as these are the types researchers have deemed most harmful. Furthermore, because it focuses on redressing the actual, physical harms caused to women, causation problems and speculative harms do not become issues.⁷⁶ Rather than making any political or moral statement about the situation of women, the ordinance would merely aim to prevent crime, thus being more narrowly tailored to evade constitutional pitfalls. Whether it could or would completely address the problem radical feminists identify is another matter.

B. Liberal Feminists.

The "liberal feminists," in contrast to the radical feminists, are liberal in the sense that they embrace abstract categories or "rights" -- like speech or equality -- as a means of defining systems.⁷⁷ Furthermore, they share the belief (radical feminists would say the delusion) that all individuals do enjoy rights equally. They are feminists in the sense that they are concerned about the advancement of women and consider such advancement a worthy goal. These two defining positions of liberal feminism arguably clash, however, when pornography is at issue. For while liberal feminists (for that matter most liberals)

⁷⁶ *Id.* at 154-56.

⁷⁷ See generally STROSSEN, *DEFENDING PORNOGRAPHY*, *supra* note 2; Beth Gaze, *Pornography and Freedom of Speech; An American Feminist Approach*, 3 *LEGAL SERV. BULLETIN* 123 (1987); Nan Hunter and Sylvia Law, *Brief Amici Curiae of Feminist Anti-Censorship Taskforce, et al*, in *American Booksellers Association v. Hudnut*, reprinted in 21 *MICH. J. OF L. REFORM* 69 (1988) [hereinafter *FACT Brief*]; *FEMINISM AND CENSORSHIP* (Gail Chester and Julianne Dickey, eds 1988). For a more general discussion of rights-based theory from traditional liberal legal theorists, see, e.g., ROBERTSON, *FREEDOM, THE INDIVIDUAL*, *supra* note 17; RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* (1977).

will concede that if pornography directly causes harms such as rape, the free speech right may be justifiably curtailed, they are less sensitive to -- or at least less willing to act to prevent -- the other potential harms to women, including, for example, the insidious effects of pornography in society.⁷⁸ As radical feminist Susan Brownmiller has commented, "when it comes to the treatment of women, the liberal consciousness remains fiercely obdurate, refusing to be budged, for the sin of appearing square or prissy in the age of the so-called sexual revolution has become the worst offense of all."⁷⁹ Indeed, the liberal line is that the free speech principle is so important that such resultant harms are a small price to pay for its primacy and greater benefits to society.

The majority of liberal feminists believe that while pornography may be implicated in women's oppression, pornography is not responsible for the oppression. Pornography may reflect and reinforce the patriarchal culture, but did not create it.⁸⁰

One group of liberal feminists which formed in response to the radical feminists' attempt to change the nature of obscenity law and pornography regulation is the Feminist Anti-Censorship Task Force (FACT). The FACT group went as far as to submit an *amicus curiae* brief to the appellate courts considering *Hudnut*. Their brief argued the unconstitutionality of the MacKinnon-Dworkin ordinance based, among other things, on its arguable violation of the Equal Protection clause of the Fourteenth Amendment to the

⁷⁸ For a discussion of these harms, see *infra* Sect. V.

⁷⁹ Susan Brownmiller, *Excerpt on Pornography from Against Our Will: Men, Women and Rape*, in TAKE BACK THE NIGHT, *supra* note 2, at 30.

⁸⁰ See generally Nancy W. Waring, *Coming to Terms with Pornography: Toward a Feminist Perspective on Sex, Censorship, and Hysteria*, 8 RES. IN LAW, DEVIANCE, AND SOCIAL CONTROL 85 (1986); STROSSEN, DEFENDING PORNOGRAPHY, *supra* note 2.

United States Constitution.⁸¹ Their primary concern, however, seemed to be that the ordinance would empower the courts too much by allowing them to construe such terms as "postures of sexual submission," "whores by nature," and "scenarios of degradation."⁸² They feared that a predominantly conservative, male judiciary would misunderstand these potentially vague terms, using them to criminalize the "wrong" materials.⁸³ They argued that the MacKinnon-Dworkin ordinance, by giving the power to interpret the language of pornography, would actually maintain the situation of women in relation to patriarchal heterosexuality, "as a medium of exchange" amongst men.⁸⁴

The liberal response to the so-called "MacDworkinites" appears to have gained greater force in the past few years, having found a powerful and vocal spokesperson in Nadine Strossen. Her 1995 book, Defending Pornography: Free

⁸¹ FACT Brief, *supra* note 77; see generally Waring, *Coming to Terms with Pornography*, *supra* note 80, at 88-89.

⁸² *Id.* at 88.

⁸³ As some commentators have noted, even Catharine MacKinnon has implicitly acknowledged the difficulty of entrusting the meaning of "sexually explicitly subordination of women" to the judiciary. In a 1984 article, she wrote

Sometimes I think that what is ultimately found obscene is what does not turn on the Supreme Court, or what revolts them more, which is rare, since revulsion is eroticized; sometimes I think that what is obscene is what turns on those men that the men in power think they can afford to ignore; sometimes I think that part of it is that what look obscene to them is what makes them see themselves as potential targets of male sexual aggression, even if only momentarily; sometimes I think the real issue is how male sexuality is presented, so that anything can be done to a woman, but obscenity is that sex that makes male sexuality look bad.

Catharine MacKinnon, *Not a Moral Issue*, 2 YALE L. AND POLICY REV. 321, 334 (1984), cited in Waring, *Coming to Terms with Pornography*, *supra* note 80, at 89.

⁸⁴ Waring, *supra* note 80, at 104-05; see also STROSSEN, *DEFENDING PORNOGRAPHY*, *supra* note 2, at ch. 11.

Speech, Sex and the Fight for Women's Rights, cites enough supporters -- along with the most extreme and objectionable examples of censorship⁸⁵ -- to make the radical feminists look like a minor sect, a loud and out-of-touch, even sexually repressed, bunch of prudes. Like other recent commentators,⁸⁶ Strossen's essential argument against censorship of pornography are: (1) blaming pornographers for sexual violence tends to absolve the actual actor, the rapist or assailant, of primary guilt; (2) women have nothing to fear from more open communication about sex; more "sexpression" is good and liberating for women.⁸⁷

V. THE NATURE OF PORNOGRAPHY'S HARMS

Radical feminists have identified and emphasized three related categories of harms they believe arise from pornography. The first and most obvious harm is that suffered by the women actually involved in the production of pornography. The second posited harm goes a step further, to those who become victims of sexual violence which was provoked by pornography. The final harm -- and that most widely criticized as speculative -- is the arguable degradation and humiliation that all women suffer from the depiction of women in pornography as mere outlets for male sexual desire. The consequence of this is an undermining of the equality of the sexes, that is, damage to gender equality.

⁸⁵ See STROSSEN, *DEFENDING PORNOGRAPHY*, *supra* note 2, at 26-29.

⁸⁶ See, e.g., David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143 U. Pa. L. Rev. 111 (1994).

⁸⁷ See Cole, *Playing by Pornography's Rules*, *supra*, at 154-77 (theorizing that the regulation of pornography is really about policing the public-private divide and that the taboo created thereby presents a line that invites transgression; "sexuality itself, demand[s] more speech, not less. More regulation and less speech will ensure that we remain bound to a pornographic conception of sexuality.")

The first harm has been well documented, and the only arguments remaining regard its prevalence. The Meese Commission determined that "at least some performers have been physically coerced into appearing in sexually-explicit material, while others have been forced to engage in sexual activity during performances that they had not agreed beforehand."⁸⁸ The finding was based on testimony of pornography models, law enforcement officers, victim counselling agencies, and sex counselors.⁸⁹ As one law enforcement officer stated, part of a sadism and masochism film is the showing of pain; "the models [have] no idea what they [are] getting into . . . we are not dealing with people that can act, . . . [so the] pain is very real."⁹⁰

Theoretically, women who suffer such harms may have available to them both criminal and civil remedies for assault, battery, false imprisonment, sexual assault and others. However, like rape survivors, these women are often deterred from seeking legal redress by shame or misplaced guilt. Furthermore, they fear they will not be believed because confronting their own testimony of coercion is a finished product portraying their seemingly apparent willingness to perform.⁹¹

⁸⁸ MEESE REPORT, *supra* note 6, at 865-66.

⁸⁹ *Id.* at 866-68.

⁹⁰ *Id.* at 868.

⁹¹ A final point is relevant to this discussion. Many argue that women are free agents to choose whether or not they will engage in activities like pornography production and prostitution; those who want to stop pornography must take up the issue with these women. However, to rely on this argument is to ignore the real lives many women lead, as well as to ignore our patriarchal culture which precludes women from many better paying jobs and which encourages them to use their bodies to achieve male approval. See generally LINDA LOVELACE, *ORDEAL* (1980); Laura Lederer, *Then and Now: An Interview with a Former Pornography Model* in *TAKE BACK THE NIGHT* 57 (Laura Lederer ed. 1980).

In an interview, a former pornography model stated that "it's all a form of rape because women who are involved in it don't know how to get out." *Interview with*

In light of these very real and practical obstacles to legal redress for those harmed in the production of pornography, law and policy makers should take seriously the need for alternative action to prevent such coercion. Thus, another argument for aggressive regulation of pornography is stated. The business is too profitable for pornographers to make truly effective any lesser efforts to prevent such forced participation. Accordingly, tighter regulation of the entire industry is warranted.⁹²

Arguments like these regarding harm to pornography "actors" have been successful in cases where the models were children, but not where they were adult women. In the 1982 case of *New York v. Ferber*,⁹³ the U.S. Supreme Court recognized, in spite of *Miller*, that the states have a compelling interest in protecting children. The Court found that this interest is strong enough to override the constitutional free speech protestations and to support a prohibition of the sexual exploitation and abuse of children, which is necessarily involved in producing child pornography. Interestingly, the Court recognized that the harms they sought to prevent were not just those to participants in production, but also to youthful viewers.⁹⁴ In addition, the Court recognized that it was "unlikely that

Pornography Model, *supra* at 64. "Your standards go down-- they're forced down by circumstances. You become fearful that you'll never be able to work at anything else. You hook into the money, but that doesn't continue unless you'll do more and more things you don't want to do." *Id.* at 65. "Women are not on the controlling end of the pornography business, just as they are not on the controlling end in the rest of our society." *Id.* at 69.

⁹² Interestingly, the Williams Committee in Britain proposed a law that would punish the purveyors of pictorial pornography when production involved actual harm to young or mal-treated models. See Williams Committee Report, *supra* note 19, at ¶¶ 6.60-6.80. Unfortunately, at least regarding this proposal, the Williams Committee proposals never materialized into law.

⁹³ 458 U.S. 747 (1982).

⁹⁴ *Id.* at 756-57.

visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work."⁹⁵ Finally, the Court stated that, where "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, [] no process of case-by-case adjudication is required."⁹⁶ *Ferber* was extended in the 1991 case of *Osborne v. Ohio*,⁹⁷ where the U.S. Supreme Court held that a state could proscribe even the mere possession of child pornography in one's home. The case was distinguished from *Stanley v. Georgia*,⁹⁸ on the basis of Ohio's justification for the law: the compelling interest in protecting the physical and psychological well-being of minors and in, essentially, destroying the market for child pornography.

Feminists have sought, unsuccessfully, to have the U.S. Supreme Court recognize an analogy between the sexual exploitation and abuse of women in producing pornography and that which they recognized with regard to children in *Ferber*.⁹⁹ In particular, MacKinnon argued in support of her draft ordinance that the States have a compelling interest in protecting women from such abuse and exploitation and that the proposed civil remedy for the individual is more empowering for a woman and therefore more appropriate than a criminal prohibition such as that deemed constitutionally permissible in *Ferber*. While the U.S. district court in *Hudnut I* rejected this argument by distinguishing

⁹⁵ *Id.* at 762-63.

⁹⁶ *Id.* at 763-64.

⁹⁷ 495 U.S. 103 (1990).

⁹⁸ 394 U.S. 557 (1969), *discussed supra* at notes 31-34 and accompanying text.

⁹⁹ See generally MacKinnon, *Civil Rights*, *supra* note 49, at 26 n. 46.

between minors and adults,¹⁰⁰ the Seventh Circuit Court of Appeal said that other causes of action could be brought by women who suffered injury in the production of obscene films.¹⁰¹ While the district court had refused to confront the reality of violent crimes against women both directly in the making of pornography and resulting from its distribution, the Seventh Circuit recognized a variety of injuries, including the general "subordination" that can result from pornography's depictions of subordination. The Seventh Circuit wrote that the "subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets Yet this simply demonstrates the power of pornography as speech."¹⁰² Thus the conflict between free speech and women's security and equality was summarized in *Hudnut* -- a far cry from *Ferber's* deference to the security and well-being of children. Similarly, U.S. courts have not recognized adult pornography's harm to "youthful viewers" in spite of their recognition of child pornography's harm to them in *Ferber*. I cannot imagine why the latter would be considered any more harmful to young consumers.

The second harm about which feminists and others are greatly concerned is sexual violence against women. The argument goes that pornography is misogynist propaganda, not only tolerating rape and other sexual violence, but even promoting it. Certainly some behavioral science studies support this proposition,¹⁰³ although others deny

¹⁰⁰ *Hudnut I*, 598 F.Supp. at 1333.

¹⁰¹ *Hudnut II*, 771 F.2d at 330. This probably refers to the types of actions noted above, not to any new cause of action.

¹⁰² *Hudnut II*, 771 F.2d at 329.

¹⁰³ MEESE REPORT, *supra* note 6; see also sources cited *infra* at notes 104-05.

that any sound correlation exists.¹⁰⁴ Probably the best-known social science research on this topic has been done by Edward Donnerstein and his colleagues.¹⁰⁵ They have concluded, essentially, that violent pornography -- no matter how sexually explicit it is as long as it is sexual in some degree -- is the greatest concern when it comes to preventing harm to women. They found that men, when exposed to such violent pornographic films (as opposed to sexually explicit and nonviolent, aggressive but nonsexual, or neutral films), were more likely to become aggressive toward women.¹⁰⁶ It was this sort of harm -- direct violence flowing from pornography consumption -- that was behind the U.S. legislation known as the Pornography Victim's Compensation Act which, as noted above, never got beyond the favorable vote of a congressional committee.¹⁰⁷ It is also the sort of injury that, at least theoretically, may be redressed in tort if courts are sufficiently flexible about the idea of proximate causation and if arguments based on the free speech principle are not allowed, *per se*, to trump.

The final type of harm is the most insidious and perhaps the most pervasive of the three. The argument goes

¹⁰⁴ See generally PORNOGRAPHY AND CENSORSHIP, Part 2: Social Scientific Studies (David Copp and Susan Wendell ed. 1980); Augustine Brannigan, *Obscenity and Social Harm: A Contested Terrain*, 14 INT'L J. OF L. AND PSYCHIATRY 1 (1991); Steven Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 MICH L. REV. 1564, 1600-03 (1988).

¹⁰⁵ See Daniel Linz, Steven Penrod & Edward Donnerstein, *The Attorney General's Commission on Pornography: The Gaps Between the "Finding" and Facts*, 1987 AM. B. FOUND. RES. J. 713; Edward Donnerstein, *Pornography: Its Effect on Violence Against Women*, in PORNOGRAPHY AND SEXUAL AGGRESSION 53, 64-69 (N. Malamuth & E. Donnerstein eds. 1984); see also Kathleen A. Lahey, *Listening to Women*, 14 INT'L J. OF LAW AND PSYCHIATRY 117, 119 (1991) (citing studies).

¹⁰⁶ Linz, Penrod, & Donnerstein, *supra*, at 720.

¹⁰⁷ See *supra* notes 4-5 and accompanying text.

that the purveyance of such materials, in which women are portrayed inauthentically and are constructed as being of much less significance than they are, creates a social climate that is hostile to women. This hostility is manifested in many ways, in addition to those already discussed, as it prevents women, as women, from achieving true power, in the political arena or in any other.

Catharine MacKinnon describes this phenomenon as the power of the male establishment constructing the social reality of gender so that the "force behind sexism [and] the subordination in gender inequality is made invisible [and] dissent from it becomes inaudible as well as rare."¹⁰⁸ A neutral legal analysis of such a production of gender fails to see the harm; it appears to be, unavoidably, "just the way things are."¹⁰⁹ Deborah Rhode has seconded this idea, noting that "the harm resulting from pornography is not confined to discrete acts of aggression against individual women. It also extends to women as a group, by eroticizing inequality, by linking female sexuality with female subordination, and by making that subordination a powerful source of male pleasure. Pornography that objectifies and brutalizes women in order to entertain men cannot help but affect the social construction of gender."¹¹⁰

A number of studies have illustrated the attitudinal changes induced by viewing of pornography, particularly violent images.¹¹¹ It is logical to infer from these studies that even when specific acts of violence do not follow from consumption of pornography, attitudinal changes still occur and are manifested in other more subtle and

¹⁰⁸ MacKinnon, *Civil Rights*, *supra* note 49, at 7.

¹⁰⁹ *Id.* at 7-8.

¹¹⁰ DEBORAH RHODE, *JUSTICE AND GENDER*, 269 (1989).

¹¹¹ See Pollard, *supra* note 68, at 130-31, and accompanying text (citing Linz, Penrod & Donnerstein, "*Findings and Fact*", *supra* note 105, at 719-22 and n. 18.)

insidious ways: sexual harassment, professional discrimination, and lack of understanding in many contexts.

This final type of harm is the one that provides the strongest *theoretical* assault on the free speech shield behind which pornography finds protection. For if the right exercised by one impedes the meaningful exercise of the rights of another, a proper balance between the two must be struck.¹¹² If the free speech right of pornographers and pornography consumers significantly impairs women, as women, from exercising their "positive liberty" to participate meaningfully in democracy, to influence public decisions it does not seem fair to dismiss the problem by saying that the primacy of the free speech principle cannot be challenged and reigns absolute, full stop. Yet, in order to realize the true head-on conflict between these two liberties, certain causation issues must be confronted, for the conflict exists only if pornography is the cause and not merely a symptom of this social climate which so grievously harms women.¹¹³

VI. THE CAUSAL LINK BETWEEN PORNOGRAPHY AND THE ALLEGED HARMS

Various causation issues arise from the feminist critique of obscenity law and its identification of the harms noted in the preceding section. The first is rather closely related to the sexual violence harm, asking whether

¹¹² See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (words inciting an immediate breach of peace may be prohibited); *United States v. Morrison*, 844 F.2d 1057 (4th Cir. 1988) (national security); *New York v. Ferber*, 458 U.S. 747 (1982) (protection of children), discussed *supra* at notes 93-99.

¹¹³ Interestingly, the district court in *Hudnut I* summarily stated that sex discrimination is not a compelling state interest justifying an exception to the first amendment. *Hudnut I*, 598 F.Supp. at 1342. They failed to recognize the need to strike a balance at all, perhaps because they considered the causation element to be missing.

pornography is, in fact, a cause or the cause of specific incidents of sexual violence. The second is that referred to in the preceding section: whether pornography is the cause or only a byproduct of a patriarchal society which oppresses women, both by provoking specific acts of sexual violence and by creating or contributing to a culture in which women are de-valued and denigrated.

In resolving the first causation issue, it is helpful to consider existing causation principles in tort law, damages law, and other areas. Generally, the law has difficulty taking seriously a harm that is not linearly caused, in close temporal proximity to a single, isolated and specific precipitating act or event. First Amendment and free speech logic are generally no different, refusing to prohibit or punish words or pictures that do not bring about some immediate and specific harmful action.¹¹⁴ One problem with such a restrictive analysis of legal injury is that it fails to consider the potential for collective harm, such as the higher incidence of rape and other sex offenses as the distribution of pornography becomes more widespread. Additionally and as a related matter, it does not recognize various more pervasive and lasting harms that may be caused by ongoing and ubiquitous objectionable activity such as the making and distribution of pornography.

Thus, the causation problem related to the third type of harm discussed above -- and to a certain extent the second -- is revealed. Consider the second harm discussed:

¹¹⁴ *Chaplinsky v. New Hampshire* provides an excellent example of this principle. In *Chaplinsky* the Supreme Court ruled that certain "insulting or 'fighting' words . . . by their very utterance inflict injury or tend to incite an immediate breach of the peace." 315 U.S. 568 (1942). As such, these words or communications are entitled to no First Amendment protection. See also *Brandenburg v. Ohio*, 395 U.S. 444 (1969), discussed *supra* at notes 71-2.

Interestingly, the *Chaplinsky* court also noted, in *dicta*, that "the lewd and obscene, the profane, the libelous" are also within this unprotected category of speech that causes harm by its very utterance.

rape and other violence against a woman. Repeated -- or even occasional -- exposure to pornography may incite a given man to commit violent and/or sexual crimes against a given woman; yet such an injury, while legally cognizable in the woman's civil action and the state's criminal action against the perpetrator, is not legally linked to the pornography which arguably provoked or encouraged it. There is currently no civil or criminal redress against any pornographer specifically or against all pornographers collectively. Linear causation is virtually impossible to prove, especially given the perpetrator's intervening exercise of will.¹¹⁵

United States First Amendment jurisprudence also has something to say about causation. If pornography were deemed a form of incitement to illegal activity, *i.e.*, rape or sexual assault, the 1969 case of *Brandenburg v. Ohio*,¹¹⁶ would be the relevant precedent. The intent requirement aside,¹¹⁷ *Brandenburg* established the requirement of a likelihood of imminent harm and held that an Ohio statute that punished mere advocacy of criminal behavior was unconstitutional; the Court held that only incitement to imminent harm was beyond constitutional protection. Arguably, violent pornography constitutes just such incitement to imminent harm. Certainly this conclusion is supported by the anecdotal evidence that men sometimes consume such pornography immediately before or during the

¹¹⁵ *But see* *Olivia N. v. National Broadcasting Co.*, 178 Cal. Rptr. 888 (Cal. Ct. App. 1981), *cert. denied*, 458 U.S. 1108 (1982).

¹¹⁶ 395 U.S. 444 (1969).

¹¹⁷ The precedents vary among federal circuits; some require intent to cause the harmful act (*NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982)) while others adopt a foreseeability standard (*United States v. White*, 769 F.2d 511 (8th Cir. 1985)).

commission of sex crimes.¹¹⁸ We also know that the incidence of violence against women has increased in recent decades, correlative to the proliferation of pornography in various media forms,¹¹⁹ a statistic that augurs in favor of regulating it based on this propensity to cause a particular harm. Unlike the political speeches in *Brandenburg* which encouraged racism, violent pornography arguably has a much tighter causal nexus with the harm complained of. Indeed, unlike speech that is racist or sexist on its face and whose ideas can more effectively be countered in the marketplace of ideas with more speech, violent pornography conveys a furtive message and often leads the viewer/consumer to respond quickly and aggressively. Accordingly, there is no (or insufficient) time for speech purveying contrary ideas to thwart the impulse; nor is the stimulus -- surreptitious, as it arguably is -- necessarily vulnerable to such reversal.

A legal analysis of the third type of harm -- the gender discrimination that affects all women in one way or another -- proves even more problematic and frustrating. In essence, women are harmed in various ways, through diverse, sometimes subtle manifestations of gender inequality, gender discrimination, and outright misogyny. Women are injured because they are women. Causality on this

¹¹⁸ See, e.g., Diana E. H. Russell, *Research on How Women Experience the Impact of Pornography*, in *PORNOGRAPHY AND CENSORSHIP* (David Copp and Susan Wendell ed. 1983); Robin West, *The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General's Commission on Pornography Report*, 1987 AM. B. FOUND. RES. J. 681, 686-90 (some men consume pornography while they commit sex crimes or force women to engage in acts they just viewed in pornographic materials.)

¹¹⁹ As the Meese Commission and others have noted, technological developments such as home videocassette records, cable television, and "dial-a-porn" have greatly increased the availability of pornographic materials. The current debate on "cyberporn" further illustrates the point. See generally Jeffrey Rosen, "Cheap Speech" in The New Yorker, August 7, 1995, at 75.

level is "essentially collective, and totalistic and contextual."¹²⁰ It is a reality, but one without legal recognition or remedy. Almost everyone would agree that pornography is far from being the only cause of this collective harm. Certainly, we know that rape existed long before pornography became so widely purveyed.¹²¹ We also know that our society has long been patriarchal, that gender inequality and gender misunderstanding pervaded our society back when pornography was a distraction only for the privileged classes, unavailable to the illiterate masses.¹²² Such facts arguably undermine the feminist argument that pornography causes inequality and mistreatment of women, as well as increased crimes against them.¹²³ Perhaps the more sound position is one that recognizes how the two factors feed off one another so that while pornography proliferates, it strengthens the patriarchal nature of our society with all its negative side-effects for women. At the same time, the more deeply inculcated misogyny becomes in the collective conscience of society, the greater the demand for pornography. It is a vicious cycle in which women will continue to be the losers.

¹²⁰ MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 2, at 157; see also Pollard, *supra* note 68, at 142 (research indicates that violent pornography incites harm, and the harm has happened, is happening, and will continue to happen).

¹²¹ See STROSSEN, *DEFENDING PORNOGRAPHY*, *supra* note 2, at ch. 12.

¹²² See generally WATKINS, *supra* note 1, at 358.

¹²³ But consider that those privileged classes who were consuming pornography were the powerful segment of society who created and dictated the patriarchal society that devalued women. Also, we do not know whether the "pornography" they consumed was violent; the only indications I know of would indicate that it was not.

VII. PORNOGRAPHY: IDEA OR "IDEOLOGICALLY VAPID"?

A. Obscenity is not "Speech" Meriting Constitutional Protection.

Twentieth century U.S. Supreme Court pronouncements on obscenity have justified legal regulation or prohibition of obscenity by saying that obscenity is not "speech" as that word is used in the First Amendment: "Congress shall make no law . . . abridging the freedom of speech . . .", but rather that it is a term of art with a circumscribed meaning.¹²⁴ Therefore, once material is classified as obscenity, the inquiry regarding constitutional protections ends. The Court has not clearly articulated a rationale for this constitutional scheme (as opposed to saying it is "speech" but simply unprotected or lower value or less protected than some other speech), but the Court's statements indicating that obscenity conveys no idea or thought indicate that the First Amendment is intended to protect speech that does convey ideas or otherwise contributes to political debate and discourse.¹²⁵ As one commentator has quipped, the First Amendment does not protect masturbatory aids.¹²⁶

¹²⁴ See *supra* text accompanying notes 24-25 (citing, among others, *Chaplinsky v. New Hampshire* and *Roth v. United States*.) Other types of speech that are not "speech" for First Amendment purposes include perjury, conspiracy, oral or written fraud, and speech that sacrifices national security. See Schauer, *Speech and "Speech"*, *supra* note 24, at 905.

¹²⁵ See *supra* note 25 and accompanying text. As noted above, the 1979 Williams Report in Britain similarly concluded that pornography was "ideologically vapid and wholly lacking in communicative content." ROBERTSON, *FREEDOM, INDIVIDUAL AND LAW*, *supra* note 17, at 197; see also Schauer, *Speech and "Speech"*, *supra* note 24, at 923-24.

¹²⁶ Cass Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV 795, 807-08 (1993) (calling much pornography not an appeal to ideas, but mere masturbatory aids). This is related to the notion that pornography is an act more than idea. See generally Gey, *The Apologetics of Suppression*, *supra* note 26; see also Rae Langton, *Speech Acts and Unspeakable Acts*, 22 PHIL. & PUBLIC AFFAIRS 293 (1993).

This explication of why obscenity is not "speech" for U.S. constitutional purposes -- that is, that it does not convey any "idea" -- upon further examination, reveals a deeply gendered basis. Prof. Cass Sunstein, who has been characterized as "pro-censorship", has described obscenity as "non-cognitive" speech that is not concerned directly with public affairs and that "cannot easily be countered by more speech."¹²⁷ This "non-cognitive" concept has been likened to "emotive" speech -- that which appeals to "passion" or emotion rather than to reason.¹²⁸ Cognitive speech, on the other hand, is speech that is "intended to or does in fact impart knowledge in any sense." Further, "[t]o react cognitively is to react mentally, or intellectually."¹²⁹ Prof. Robert Post has defended the censorship of obscenity by saying that it "pertains, not to the realm of ideas, reason, intellectual content and truth-seeking, but to the realm of passion, desires, cravings and titillation."¹³⁰

This distinction reflects the theoretical tradition that endorses a reason-passion dichotomy, a dualism that, as noted in Chapter 2, is often reflected in legal analy-

¹²⁷ Cass Sunstein, *Pornography and the First Amendment*, 1986 Duke L.J. 589, 617; see also Alon Harel, *Bigotry, Pornography, and the First Amendment: A Theory of Unprotected Speech*, 65 S.CAL.L. REV. 1887, 1889 (1992) (pornography has "no direct political content" and therefore is not necessarily political speech).

¹²⁸ Sunstein, *Pornography and the First Amendment*, *supra*, at 603-04 & n.87, 612-17 (citing Finnis, "Reason and Passion": *The Constitutional Dialectic of Free Speech and Obscenity*, 116 U. PA. L. REV. 222, 234-36 (1967)).

¹²⁹ Schauer, *Speech and "Speech"*, *supra* note 24, at 922 n. 137, cited in Sunstein, *Pornography and the First Amendment*, *supra* note 127, at 603 n. 88.

¹³⁰ Robert Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy and the First Amendment*, 76 CALIF. L. REV. 297, 328-29 (1988).

sis¹³¹ and is, in particular, associated with the public-private (market-family) dichotomy. These values are reflected, for example, in *Miller v. California*'s test of obscenity -- specifically in the third prong which inquires whether the material in question, taken as a whole, lacks serious literary, artistic, political, or scientific value.¹³² The point is that some cognitive, mental, or intellectual value -- as opposed to a naked appeal to the non-cognitive, the realm of the senses, of desires, titillation -- the realm of the female and feminine.

The reason-passion, market-family, male-female dichotomy has been much criticized by feminists who complain of the law's failure to deal or act in the realm of "passion," that realm associated with the female, feminine, or private. It is consistent with this critique, which complains of the discounting of the feminine in culture and law, that the U.S. Supreme Court should deem such "passionate," non-cognitive materials, not even to be "speech" such that it would be subject to further consideration under First Amendment jurisprudence. Paradoxically, this dichotomy -- while masculine on a theoretical level -- has served the radical feminist goal by functioning as the justification for banning at least some pornography (the "obscene") for many years. Just as ironic is the radical feminist belief that this same pornography is idea and value-laden, not a mere appeal to "passion."

B. The Message of Pornography.

Most feminists take a position contrary to that of traditional obscenity law theory that obscenity is ideologically bereft. Radical feminists argue that pornography conveys and perpetuates the extremely harmful and objectionable idea that women are inferior to men or, worse

¹³¹ See, e.g., Finnis, "Reason and Passion", *supra* note 130.

¹³² *Miller*, 413 U.S. at 24, 27.

still, that women enjoy being hurt, that they enjoy forced sex.¹³³ Some "liberal" feminists, on the other hand, agree that pornography conveys a message, but argue that the message is a positive one: that "sexuality need not be tied to reproduction, men or domesticity." Accordingly, they argue that pornography promotes sexual liberation, not sexual subordination, of women.¹³⁴ In essence, they see pornography's transcending of the public-private dichotomy as a positive development for women. Still other feminists would not label what pornography promotes "idea," saying that like obscenity, it should be distinguished from the political ideas which the free speech principle is aimed at protecting.¹³⁵

Ironically, under current First Amendment jurisprudence, if the radical feminist position that pornography conveys the proposition or idea of women's inferiority would get pornography and obscenity classified not only as protected "speech," it would even entitle the speech, as political speech, to the highest level of constitutional protection.¹³⁶ As Ronald Dworkin has observed,

¹³³ See generally ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1987); MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 2; Robin Yeamans, *A Political-Legal Analysis of Pornography in TAKE BACK THE NIGHT*, (Laura Lederer, ed. 1980) ("[p]ornography is virtually soliciting men to commit crimes of violence . . . [t]his is basically the 'subliminal sell'").

¹³⁴ Nadine Strossen, *A Feminist Critique of "The Feminist Critique of Pornography"*, 79 VA. L. REV. 1099, 1130-33 (1993).

¹³⁵ See, e.g., Susan Brownmiller, *Let's Put Pornography Back in the Closet* in *TAKE BACK THE NIGHT*, *supra*. See generally Harel, *Bigotry, Pornography*, *supra* note 127, (arguing that pornography and other types of "abhorrent" speech are not political speech of the type that the First Amendment is intended to protect; only idea and values that aid in the "process of shaping our political obligations" constitute political speech).

¹³⁶ See Chapter 3 at Sect. IV (A).

It would plainly be unconstitutional to ban speech directly advocating that women occupy inferior roles, or none at all, in commerce and the professions, even if that speech fell on willing male ears and achieved its goals. So it cannot be a reason for banning pornography that it contributes to an unequal economic or social structure, even if we think it does.¹³⁷

As the *Hudnut II* court wrote, implicitly recognizing that pornography does convey idea: "The state may not ordain preferred viewpoints . . . The Constitution forbids the state to declare one perspective right and silence opponents."¹³⁸ The court said that an ordinance criminalizing "speech treating women in the disapproved way -- as submissive in matters sexual or as enjoying humiliation" while not criminalizing speech that depicts women "in sexual encounters 'premised on equality'" was impermissible content discrimination. In essence, the Seventh Circuit -- consistent with First Amendment precedent on non-obscene materials -- declared the expression of female inferiority a protected viewpoint.

The radical feminist point about this paradox of First Amendment law (similar to the critical race theorist point about racist speech) is that the stance ignores the impairment of the positive liberty of women (or racial minorities) caused by such speech. That is, the law ignores, deliberately or not, that pornography (like other sexually hateful speech) hinders women's full participation in political and social processes -- in the public sphere -- because it causes them to be perceived as something less than they are, as something less than men.

Further, it should be recognized that pornography arguably does not on its face or in an clear or conspicuous

¹³⁷ Ronald Dworkin, *Liberty and Pornography*, New York Rev. of Books, August 15, 1990, at 12, 14 col. 3 (excerpted from ISAIHA BERLIN: A CELEBRATION (Edna and Avishai Margalit, ed. 1991)).

¹³⁸ *Hudnut II*, 771 F.2d at 325.

way convey the idea of women's inferiority. It does not come out and say, "women are inferior to men" or "women are sexually subservient to men." The message is a subtler one than that; indeed, the average consumer probably may not perceive any "message" at all. That is the point. The consumer's motive is entertainment, but along with that he (or she) gets a subliminal or subconscious message of gender inequality. Pornography "cues to a scenario in which inflicting violence seems pleasurable and inhibitions against it are lifted."¹³⁹ Because the message may not be one perceived on the conscious level, it is arguably not so easily rebutted in the "marketplace of ideas"; it is not so easily countered by rational speech explaining women's equality or that women do not, in fact, desire sexual subservience.¹⁴⁰ Indeed, because a consumer may not realize he is getting such a message, it may remain latent in his subconscious and never consciously linked to -- and therefore not rebutted by -- mainstream "cognitive" messages of women's equality, dignity, and person-hood.

VIII. PORNOGRAPHY AND THE FEMINIST CRITIQUE OF THE PUBLIC-PRIVATE DICHOTOMY

Pornography makes a particularly interesting object of the public/private critique because it is arguably from pornography's publication or public representations of private acts (or, at least, some acts that are acceptable in private) that pornography derives some of its power.¹⁴¹

¹³⁹ Paul Chevigny, *Pornography and Cognition: A Reply to Cass Sunstein*, 1989 DUKE L.J. 420, 426.

¹⁴⁰ Professor Sunstein likens pornography to "fighting words"-- a face-to-face provocation to fight. Sunstein, *supra* note 127, at 613-16. He characterizes it as passion in the sense that it is an experience the consumer undergoes and over which he has no control. It is more like a stimulus than a communication.

¹⁴¹ See generally Ian Jarvie, *Pornography and/as Degradation*, 14 INT'L. J. OF LAW AND PSYCHIATRY 13, 19 (1991); see also Williams Committee Report, *supra* note 19, at 96-97 ("The basic point that pornography involves by its nature

Pornography's ability to arouse -- arguably its primary function or utility -- is arguably rooted in this illicitness, which implicates notions of what we consider properly public and what we consider properly private. Pornography blurs the lines between the two. (Interestingly, it is in this blurring of the public-private distinction that liberal feminists find cause to praise pornography for separating sexuality from domesticity). Notions about what is property public and what is properly private have also informed the criminalization of obscenity and the regulation of pornography.

One aspect of feminism's public-private critique has already been brought to bear on obscenity law in the preceding section: the theoretical underpinning of obscenity law reflects the parallel reason-passion dichotomy, the former being an area of legal concern or activity, the latter, not. The public-private critique of obscenity and pornography is not limited, however, to this observation.¹⁴²

As an initial matter, it should be noted that U.S. courts distinguish between obscenity in public, which can be regulated,¹⁴³ and consumption of obscenity in private, which is considered constitutionally protected.¹⁴⁴ The protection of "public morality" is stated as the goal of

some violation of lines between public and private is compounded when the pornography not only exists for private consumption, but is publicly displayed."); Lacey, *Theory into Practice*, *infra* note 142, at 104 (citing R. Coward, *FEMALE DESIRE* (1984)).

¹⁴² See generally Nicola Lacey, *Theory into Practice? Pornography and the Public/Private Dichotomy*, 20 J. OF LAW AND SOCIETY 93 (1993).

¹⁴³ See *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (nude scenes in movies constitutionally protected even if shown on drive-in theater screen that is visible from public street); *Bread v. Alexandria*, 341 U.S. 622, 641-45 (1951); *Kovacs v. Cooper*, 336 U.S. 77, 87-89 (1949).

¹⁴⁴ *Stanley v. Georgia*, 394 U.S. 557 (1969).

obscenity law, and the public right to free speech protects pornography that does not rise to the level of obscenity. However, as confirmed in *Stanley v. Georgia*, the "right to satisfy [one's] intellectual and emotional needs in the privacy of his own home" -- including the consumption of obscene materials -- is sacrosanct, a right to privacy or to be free of law's interference. Never mind that these two positions are contradictory -- that it makes no sense to say that obscene materials that are not legally available publicly can legally be consumed privately. The distinction nevertheless serves to keep obscenity (and most pornography) behind closed doors -- to keep it "private." At the same time, however, the relegation of pornography to the private realm, safely removed from legal interference, ignores the impact or power of the material in the public sphere -- it ignores the political statement that pornography makes, wherever it is consumed. The feminist refrain that "the personal is political" again rings true, and the desirability of blurring (if not completely obliterating) the jurisprudential distinction between the public and private spheres in the sense of inviting regulation is again illustrated.

IX. CONCLUSION

Much of the feminist critique of obscenity law and pornography recited in this chapter is "old hat." Obscenity was the first aspect of free speech law to come under feminist scrutiny, and much of what there is to say has been said elsewhere, several times over.

First, women's concerns are greatly undervalued -- if not completely ignored -- in the long-standing traditional Western legal analysis of obscenity. The debate has long been about protecting public morality on the one hand while also protecting the right of privacy, inasmuch as it includes expressions of sexuality such as pornography. The former goal, as far as it considers women, seems to view them paternalistically, as fragile beings to be protected

from vile material. This rationale, however, ignores the trafficking and coercion of women in the production of obscenity and thus implicitly sanctions the Madonna-whore dichotomy.¹⁴⁵ The latter concern -- the protection of individual privacy -- overlooks the fact that man's private entertainment is often woman's scorn or degradation, a derision that carries over and undermines women's public status.

Furthermore, traditional liberal legal theory, as many commentators have observed in this and other contexts, fails to see that the right to free speech -- which is the right invoked to protect pornography that does not rise to the level of obscenity -- is not a right enjoyed equally or meaningfully by all. Catherine MacKinnon has summarized it thus:

The most basic assumption underlying First Amendment adjudication is that, socially, speech is free. . . . Free speech exists. The problem for government is to avoid constraining that which, if unconstrained by government, is free. This tends to presuppose that whole segments of the population are not systematically silenced socially prior to government action. The place of pornography in the inequality of the sexes makes such a presupposition untenable and makes any approach to our freedom of expression so based worse than useless. For women, the urgent issue of freedom of speech is not primarily the avoidance of state intervention as such, but finding an affirmative means to get access to speech for those to whom it has been denied.¹⁴⁶

My main independent contribution to the feminist critique of obscenity law is this. The characterization of obscenity as outside the purview of "speech" for First Amendment purposes appears linked to the idea that such communication is about "passion" rather than reason, the

¹⁴⁵ Women are either "Madonnas," to be protected, placed on a proverbial pedestal, or they are "whores," of no moment whatsoever. See Chapter 3 at n. 112.

¹⁴⁶ MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 2, at 157-58.

latter being the province of serious First Amendment concern and analysis. Even the current standard for determining what is obscene reflects this dichotomy: in order to be obscene, the material must lack serious literary, artistic, political or scientific value. This rationale for placing the obscene completely beyond the pale of First Amendment protection reflects the old public/private, masculine/feminine, mind/body, rational/emotional dichotomies -- some matters are properly the province of legal regulation; others are not. While this rule has led to the criminalization of some materials that radical feminists believe harmful, this characterization has avoided a systematic and meaningful analysis of obscene and/or pornographic speech -- its meaning or sub-text, value, its consequences, its utility. There is no balancing of interests or harms, only a placement of obscenity beyond the pale of constitutional protection, which has also effectively sheltered obscenity, along with its companion, pornography, from thorough legal scrutiny.

Conclusion

Sexist speech, like rape, is not only -- and perhaps not at all -- about sex. It is about power.

Marcy Strauss¹

Not only is sexually hateful speech about power, it is indeed powerful. Because women are often targeted by sexually hateful speech -- indeed, misogynist speech² is a common thread through many communicative injuries women suffer -- it is important to understand the power dynamic at play with regard to this speech. It is therefore useful to consider more thoroughly the meaning of the speech. It is also critical to a legal assessment of the speech to consider the social and cultural context in which any particular bit of misogynist speech is uttered.

I. THE MEANING OF SEXUALLY HATEFUL SPEECH

Misogynist language most often focuses on some aspect of women as sexual beings. It frequently refers to them as female body parts -- often slang words, in particular, for those parts associated with sex acts: tits, cunt, or pussy. Similarly, sexually hateful speech utilizes any of a number of terms associated with sexually immoral women: whore, bitch, slut, and slag, to name a few. Calling a woman a "head giver" or telling her she's "just a piece of meat" or describing the sex acts you want to perform on her are other examples of how misogynist speech focuses on

¹ Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1, 13 (1990) (footnotes omitted).

² I use the terms "misogynist speech" and "sexually hateful speech" interchangeably here, although the former is arguably much broader than the latter.

women as sexual beings.³ Expressive conduct that is not technically speech frequently refers to body parts and sex acts.⁴

I do not know, on the other hand, any male-specific terms that imply or assert sexual promiscuity. Men's sexual scruples are seldom attacked by epithet, and when they are, the female word, e.g., slut or whore, is used. These female-specific words may also be used to label men as generally unpleasant, just as they are used to convey that meaning about women. Epithets used to assault men verbally do sometimes refer to male sex organs, but they more often refer to gender-neutral body parts or to female-related terms such as "bastard" or "son-of-a-bitch" -- labels that actually refer to the sexual decency of the man's mother, not to his own. Finally, labels implying homosexuality -- often with feminine connotations -- are also sometimes used to verbally assault men.

Of course, women and the feminine have long been associated with the private, family, emotional, and body sides of the masculine/feminine, public/private, market/-family, rational/emotional, and mind/body dichotomies that

³ See, e.g., Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517 (1993); Strauss, *Sexist Speech in the Workplace*, *supra* note 2, at 1-2 (citing numerous cases); *Katz v. Dole*, 709 F.2d 251, 254 (4th Cir. 1983) (quoting C. MILLER & K. SWIFT, *WORDS AND WOMEN* 109 (1977)); see also Jeanne L. Schroeder, *Feminism Historicized: Medieval Misogynist Stereotypes in Contemporary Feminist Jurisprudence*, 75 IOWA L. REV. 1135, 1191-92 (sexuality has historically been seen as a defining factor of woman's nature; women have historically been equated with sex); Jane E. Larson, *"Women Understand So Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction*, 93 COLUMBIA L. REV. 374, 438-42 (1993).

⁴ I refer to expressive acts such as grabbing one's crotch and other lewd gestures that often accompany misogynist speech directed at women.

permeate Western culture.⁵ In this sense, it seems misogynist speech is even more gendered than is obvious at first glance. That is, it is sub-textually as well as manifestly gendered. It reflects deeply imbued cultural notions about that which is associated with the female, as opposed to the male. Thus, words or labels associated with sexuality -- and with female sexuality in particular -- carry negative meanings; they are pejorative whether used to label women or men. Our vernacular does not include epithets derived from the male sides of each of the dichotomies -- neither the mind nor the rational is denigrated in our culture.

So misogynist speech is about power in this sense -- in the way it dis-empowers women by slapping them in the face, as it were, with their own sexuality. By doing so, it reminds them of their association with the "lesser" side of life, if you will, with that which our culture sees as negative, base, unclean. It identifies them with the "feminine" in its most pejorative sense, a powerful message indeed.

Closely related to this is sexually hateful speech's role as a tool with which some men respond to the threat represented by the presence of women in public sphere: the work-place, the university, public streets, and other public spaces. Its sub-text and essential message to women -- no matter the vile and seemingly meaningless language in which it is often cloaked -- is that women are inferior to men; they do not belong in the public sphere of life.⁶ The speech puts women in their proverbial place. And sadly, it often also serves literally to put (or keep) them in that place. That is, places where such speech is commonplace, or where it is directed at particular women or a particular woman, usually become places that women avoid if at all

⁵ See generally Schroeder, *Feminism Historicized*, *supra* note 3; Susan Williams *Feminist Legal Epistemology*, 8 BERKELEY WOMEN'S L.J. 63, 66 (1993).

⁶ And this, I think, is how Marcy Strauss meant it. See *supra* text accompanying note 1.

possible. Therefore, when such speech is common at a construction site on a street -- if construction workers shout sexual epithets or other lewd comments at women passersby -- women often go out of their way to avoid walking down that street. By the same token, if such misogynist language pervades a work or educational setting, and especially if it targets a specific woman or women in that setting, women may go as far as to quit jobs or abandon their educational pursuits in order to avoid being exposed to or targeted by this language. In this sense, the sexually hateful speech dis-empowers women in a very tangible way, but in doing so, it does not operate in a vacuum. It plays off deeply entrenched dominant cultural images, ideas and stereotypes about women.

At play here, too, are the culturally constructed images the women hold (at least subconsciously) of themselves as women. These are rarely images of people whose second-nature it is to be in the paid work-force or to be engaged in other historically male pursuits. Few women grow up taking for granted their participation in the public sphere -- certainly not as decision-makers and leaders there. They may aspire to it, but in part because they have so few women role models, they are more likely to doubt -- at least subconsciously -- that they will actually achieve it.⁷ As a consequence of this and the lesser degree of social power they enjoy generally, women (like other less powerful groups) may be more easily intimidated and deterred from their goals, less likely to stand up for themselves in the face of sexually hateful speech and other gender-based hostility. It may cause them to experience

⁷ See generally Deborah Rhode, *The "No-Problem" Problem: Feminist Challenges and Social Change*, 100 YALE L. J. 1731, 1750-55 (1991) ("Compared with men, women tend to rate their own work more harshly, and are less likely to take credit for favorable results) (citing Lott, *The Devaluation of Women's Competence*, 41 J. Soc. ISSUES, No. 4, 1985, at 43, 50 and others); ("When asked how much pay they deserve for a particular task, women select lower amounts than men.") (citing various studies).

self-doubt and to question whether they really do belong in that setting.⁸ In this sense, sexually hateful speech can be a mighty powerful deterrent to women's full participation in the public sphere of life.

II. THE LAW'S FAILURE TO RESPOND TO SEXUALLY HATEFUL SPEECH

Because sexually hateful speech is so powerful and because it hinders women's quest for substantive equality, it is important to consider law's response to misogynist speech. I have discussed three tort causes of action that may redress the injury that sexually hateful speech causes women: defamation, invasion of privacy, and intentional infliction of emotional distress. I have also identified a number of problems with each of these in terms of their appropriateness for redressing the injury caused by misogynist speech.

First, defamation is aimed at redressing injury to reputation, and while labelling a woman with a sexually hateful term, e.g., "slut," can be injurious to her reputation, this is generally not the purpose of the speech or, for that matter, its primary effect. For example, when I was labelled "slut" by the poster in the law review office, I do not believe that the primary purpose of the men who put up the poster was to injure my reputation -- either by indicating that I was sexually promiscuous or that I was an unpleasant woman.⁹ When I objected to the poster some people came to believe that I was an unpleasant and unreasonable woman for doing so, but I am convinced that this was more a consequence of my response to the poster than to the poster's message. If I had completely ignored the poster, I doubt my reputation would have been affected at

⁸ See Guiner, *Becoming Gentlemen*, *infra* note 48.

⁹ See, e.g., *Lee v. Metropolitan Airport Commission*, 428 N.W.2d 815 (Minn. App. 1988); *Ward v. Zelikovsky*, 643 A.2d 972 (N.J. 1994).

all.¹⁰ I do not believe that the poster ever actually made people question my sexual scruples. Thus, while I could certainly argue that I was defamed by being called a "slut" and a "head giver," and while I could probably manipulate the facts in such a way as to fit that cause of action, my primary injury was not a reputational one. And, as I have already explained, I am skeptical about whether I could have prevailed with a defamation suit -- in part because of the nature of the actual injury and in part because the defendants would have had available to them some excellent defenses, most notably the argument that they were stating an opinion rather than a fact.¹¹

None of the four types of invasion of privacy recognized in United States torts jurisprudence appears to have much relevance to misogynist speech. The possible exception is so-called false light invasion of privacy which redresses injury caused when a publication, while not when technically defamatory in the sense of portraying a person as immoral or otherwise accusing him or her of bad conduct, is offensive because it embarrasses a person by portraying him or her as something he or she is not. The tort requires that the publication be "highly offensive" to a reasonable person, a criterion that might be difficult to satisfy in a misogynist speech case, probably depending upon the context in which the misogynist speech was ut-

¹⁰ Failure to respond or "make a fuss" would have assured the men that I was not a threat to the usual order.

¹¹ This argument seems especially helpful to defendants in cases where the offensive speech in question was humorous or satirical, which the poster arguably was. See, e.g., *Pring v. Penthouse Int'l Ltd.*, 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983) (finding that portrayal of plaintiff, a former Miss Wyoming, as a fellatio-performing baton twirler not to be a factual account, but rather to be "fantasy"); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (ad parody portraying Falwell, a pastor, as a drunken hypocrite whose first sexual encounter was with his own mother found not to be factual assertion).

tered.¹² That is, one could say that in this day of lax or at least amorphous standards of sexual propriety, undermining one's sexual character with a comment as vague as "slut" or by simply saying someone gives head, implicates the tort of false light invasion of privacy, not defamation. That is, it casts the person in a false light that embarrasses, while not necessarily defaming. As for the possible application of this tort to the described scenario, though, it would likely fail. First, the tort requires an adjudication of outrageousness; most people in the law school community did not seem to think the poster labelling female law review members "head giver" and "slut" was offensive and therefore a jury from the same community might not either. Besides, the tort also requires that the offending statement be disclosed to the public at large, as in a generally distributed publication. Thus, a poster on a law review office wall -- like many other instances of the purveyance of misogynist speech -- would not suffice to satisfy this requirement.

Intentional infliction of emotional distress is another possibility for a cause of action to respond to sexually hateful speech. Again, however, it requires a finding that the speech (and/or actions) complained of was extreme and outrageous, and that it caused the plaintiff severe emotional distress.¹³ Very high standards are associated with all elements of the tort, and a great deal depends on the jury's assessments of the relevant facts in

¹² *But see* *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128 (7th Cir. 1985), discussed at Chapter 5, Sect. V (B).

¹³ *See, e.g., Bristow v. Drake Street, Inc.*, 41 F.3d 345 (7th Cir. 1994) (speech and behaviour included harassing messages from male defendant to female plaintiff that he hated her and wished her dead); *Smith v. Atkins*, 622 So.2d 795 (La.App. 4 Cir. 1993) (male law professor called female law student a "slut"). *But see Lee v. Metropolitan Airport Commission*, 428 N.W.2d 815 (Minn. App. 1988) (calling woman a "bitch" behind her back considered part of office gossip and not sufficiently severe and outrageous to constitute intentional infliction of emotional distress).

light of these standards. On balance, intentional infliction of emotional distress is probably the best bet, among torts, for redressing misogynist speech that is directed at a particular woman. Successful use of the tort, however, requires special attention to explaining why calling a woman a "slut," for example, although that word may be considered part of vernacular and commonly used, is extremely offensive and, where appropriate, explaining any aggravating circumstances, (e.g., the woman's legitimate fear of sexual assault) that led to its causing severe emotional distress.¹⁴

The cause of action that is most responsive to sexually hateful speech -- as well as most understanding of its effect on women, is not a tort. It is the U.S. federal law on sexual harassment, and it is relevant, of course, only in the workplace. Furthermore, while the cause of action may alleviate a woman's forced exposure to sexually hateful speech by enjoining the speech (and accompanying behavior where also at issue), caps are placed on the amount of monetary compensation that may be awarded. Nevertheless, the development of U.S. sexual harassment law in the last decade -- and in particular in the last five years -- has evinced great sensitivity to women's particular vulnerabilities in the work-place. It has also shown tremendous receptivity to women's own perceptions, even going as far as to assess a harasser's behavior as it would be assessed by a "reasonable woman."¹⁵ The U.S. Supreme Court initially articulated the sexual harassment situation in comparison to racial harassment:

¹⁴ The Restatement (Second) requires distress "so severe that no reasonable man could be expected to endure it." RESTATEMENT (SECOND) OF TORTS § 46, comment j. Perhaps in sexually hateful speech cases, this standard should be a "reasonable woman" one.

¹⁵ See, e.g., *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991); *Burns v. McGregor Electronic Industries, Inc.*, 807 F.2d 506 (8th Cir. 1993).

Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality in the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.¹⁶

Thus the Supreme Court recognized that enduring sexual harassment should not be the price women have to pay to stay in the work-force. In the same case, the Court recognized that one type of actionable harassment was constituted by a so-called "hostile work environment." This requires, among other things, that the plaintiff prove that he or she was subjected to verbal or physical conduct of a sexual nature and that the conduct was sufficiently severe or pervasive as to alter the conditions of employment and create a hostile work environment.¹⁷

In the past five years, the U.S. federal courts have found a wide range of communicative activity to be sexual harassment such that it created a hostile work environment. For example, in *Burns v. McGregor Electronic Industries*,¹⁸ the plaintiff was called, among other "obscene names," bitch, slut, and cunt. Some of her fellow employees brought to work a magazine called Easyriders in which plaintiff Burns had appeared in "provocative poses"; the employees "repeatedly made harassing comments to Burns

¹⁶ Meritor Savs. Bank v. Vinson, 477 U.S. 57, 59 (1986) (quoting Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982)).

¹⁷ These are (1) that the plaintiff was subjected to sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; (2) that the conduct was unwelcome; and (3) that the conduct was sufficiently severe or pervasive as to alter the conditions of the employee's employment and create a hostile work environment. *Jordan v. Clark*, 847 F.2d 1368, 1373 (9th Cir. 1988), cert. denied, 488 U.S. 1006 (1988).

¹⁸ 807 F.2d 506 (8th Cir. 1993).

about the photographs." In addition, the owner of the company made unwelcome sexual advances toward Burns. The court easily concluded that these constituted a hostile working environment. The same court in another case observed that "[i]ntimidation and hostility toward women because they are women can obviously result from conduct other than explicit sexual advances."¹⁹ In that case, the plaintiffs were not only the targets of sexually hateful epithets such as "fucking flag girls," they were also "asked" by their co-workers to perform sex acts with them.²⁰ In another case a woman prevailed on her sexual harassment claim on the basis of photos of nude women posted in the work-place, as well as comments (whose targeting of the plaintiff was disputed) such as, "I'd like to get in bed with that."²¹ These cases reveal judges' growing awareness of the harms of sexually hateful speech in the work-place. Just as importantly, they reveal a heightened understanding of women's own perceptions of such speech, including the way in which it can intimidate and cower women. As one court recently wrote,

[B]ecause women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault. Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social

¹⁹ Hall v. Gus Construction Co., 842 F.2d 1010, 1014 (8th Cir. 1988).

²⁰ I put "asked" in parentheses because I do not believe the men were making a sincere request that these women engage in the acts. They simply intended to demean the women by "asking." Thus, this case really was solely about sexually hateful speech; it was not a case that also involved the proposed exchange of sexual activity for promotion, so called *quid pro quo* sexual harassment.

²¹ Robinson v. Jacksonville Shipyards, Inc., 760 F.Supp. 1486 (M.D. Fla. 1991).

setting or the underlying threat of violence that a woman may perceive.

* * *

If we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination. Harassers would continue to harass merely because a discriminatory practice was common, and the victims of harassment would have no remedy.

* * *

A complete understanding of the victim's view requires, among other things, an analysis of the different perspectives of men and women [because] [c]onduct that many men consider unobjectionable may offend many women.

* * *

[A] sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women.²²

Given this veritable revolution in the recent law of sexual harassment recently, I have little doubt that if my law review scenario had occurred in the work-place and if it were brought as the basis of a sexual harassment claim in 1996, I would prevail under current Title VII precedents.

Perhaps the law of tort could learn from the progressive gender trends of U.S. sexual harassment law. In particular, the law of intentional infliction of emotional distress, the tort I believe best-suited generally to respond to the harm of directed misogynist epithets and other sexually hateful communication, could benefit from greater attention to the "reasonable woman" perspective. As articulated so nicely in the lengthy quote above from *Ellison v. Brady*, when considering speech (and actions) that harms women -- targeting them because they are women (i.e., on the basis of their sex or utilizing sexually hateful language) -- it is appropriate to consider the

²² *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991).

perspective of a "reasonable woman" rather than that of the reasonable man or even the ostensibly gender-neutral reasonable person. A reasonable man, for example, might consider calling a woman a "cunt" or a "whore" to be vulgar or offensive, but not necessarily "extreme and outrageous." After all, such words are part of '90s vernacular--you hear them in the movies, on the street, in songs. The fictional "reasonable woman," on the other hand, may assess the words quite differently. She can imagine what it would feel like to have such words spoken to (or shouted at) her; she can empathize with the intimidation and fear they might arouse, particularly depending on where spoken and the ease or difficulty with which the woman can get away from the speaker. She can also more readily empathize with the psychic or emotional injury -- understanding the blow to human dignity, the blow to female person-hood, represented by the words.²³

As I have said elsewhere in this thesis, the gendered critique of law is most probative and legitimate when applied within the context of a specific place and time. Accordingly, just because I would endorse use of reasonable woman standard in the United States in 1996 does not mean I would endorse it until the end of time. There may be a time when this language does not represent what it does now, when women have sufficient social power not to be debilitated by such vitriolic language, such bare-faced hate. There will, as a consequence, hopefully also be a time when such epithets are not so commonly used. As I have said from the outset, I am aware of the feminist risk of reinforcing gender stereotypes by associating certain sensitivities or pre-dispositions with one gender or the

²³ This is consistent with the doctrine of the thin-skulled plaintiff (or as one might say in this context, "thin-skinned" plaintiff); the tortfeasor take the victim as he or she is -- if the speech targets a woman, women's sensibilities (or even that individual woman's sensibilities) are the relevant subject of the inquiry. See also *supra* Chapter 3, n. 201.

other. Nevertheless, as long as the social factors that cause women to cower and be injured by misogynist speech exist (considerably lesser degree of social power; legitimate fear of sexual assault in a society where up to 40% of women will be victims in their lifetimes; lack of personal as well as job security), I believe a reasonable woman standard is appropriate for assessing whether such speech is "extreme and outrageous" --as well as the severity of the injury thereby caused.

III. COMMUNICATIVE TORTS IN HISTORICAL PERSPECTIVE.

The torts I have discussed are generally inadequate to redress the harms of misogynist speech, in part because none evolved or was eventually embraced by the law with that purpose in mind. As I have discussed elsewhere, the twin torts of libel and slander were aimed at protecting reputation, and more precisely at protecting a person's good name so that he could function on a level playing field in the public sphere, the world of commerce. The early relevance of the tort to women is evinced by the *per se* slander category that exempts a woman (but not a man) from proving actual pecuniary damages when the basis of her suit is that her chastity has been impugned.

The tort of invasion of privacy is much younger, having been recognized in the United States only in the last century. Proposed in a law review article by two prominent lawyers, Samuel Warren and Louis Brandeis, the tort was intended to provide redress for the "distress" and "mental pain" caused by invasion of privacy, which they called an insult to one's honor, to one's whole personality. The initial idea of a privacy tort seems to have been motivated by a paternalistic desire to protect the greater sensibilities of women and to maintain the traditional public/private (market/family) divide. Indeed, the tort appears at first blush to respond to a private (domestic/family) sphere injury by virtue of its aim to allow people to keep private -- that is, hidden -- that which

they consider private (personal/domestic/family),²⁴ and in that sense could be seen as a woman's tort because women have been associated with that sphere. But this analysis does not hold up under further scrutiny. Indeed, the tort is more one that redresses the injury caused when a public (market) sphere person has some aspect of his (or less often her) private (domestic/family) sphere life revealed. This injury is in the public, the public revelation of something private.

The tort of intentional infliction of emotional distress, on the other hand, might be seen as a woman's tort. It responds to what has been viewed as a typically female injury -- emotional or psychic distress -- an injury to which men were not seen as being so vulnerable. Thus, although not articulated in a gender specific way, the tort nevertheless was initially often employed by women plaintiffs -- and still is. I see the tort's recognition as a positive development in tort law -- especially in as much as it can be used to provide redress for communicative injuries for which there is no other avenue for relief. Nevertheless, in considering what is or is not "extreme and outrageous," I suggest that a "reasonable woman" standard -- or at a minimum a reasonable person" standard -- currently would be a better one than the reasonable man standard for assessing an objectionable statement, particularly one with sexual connotations, made to a woman.

IV. JUDICIAL INTERPRETATION OF THE TORTS

An analysis of the interpretation and application of these tort doctrines by judges and juries also reveals certain gender-based assumptions that often operate to the detriment of women plaintiffs. These assumptions have often reflected the reality of women's social status at a given place and time, as have the uses women have been able

²⁴ See, e.g., *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222 (7th Cir. 1993).

to make of the torts in redressing the communicative injuries they have suffered.

The types of reputational injuries for which women have sought redress has typically reflected women's social status; therefore, women's utilization of the tort of defamation has evolved with women's place in society, specifically their entry into the public (market) sphere. Because historically women have not functioned in the public sphere, but rather have been associated with the domestic sphere of home and family, defamation was not as useful for them. When women did employ the tort, they often did so to redress reputational injuries associated with the private, in particular that which was regarded as of paramount importance for them: their sexual integrity. This is high-lighted by the slander *per se* category related to a woman's chastity. Women's increasing participation in the public sphere no doubt corresponds to their use of defamation suits to get compensation for injuries that undermine their standing in the market-place, just as men do.

Another anomaly of tort law that must be mentioned in this discussion of gender is the rule that publishing that a woman has been raped defames her. Although the woman has committed no criminal act and done nothing wrong, nothing that *should* undermine her reputation -- after all, she is the victim -- the law recognizes the damage to her reputation of such a disclosure.²⁵ As I have noted elsewhere, while this rule reflects a certain realism, it is a sad reflection on prevailing attitudes toward rape and fault.

As for the U.S. constitutional limitations that have been imposed on defamation actions in the past 30 years, in particular the heightened fault standards associated with public figure and public official plaintiffs, as well as with matters of public concern, these are ostensibly gender neutral. To the extent women continue to move into the

²⁵ See, e.g., *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128 (7th Cir. 1985).

public sphere, particularly in leadership roles, and to become engaged with matters of public concern, the more likely they are to be subject to these heightened fault requirements when they sue for defamation. This is only fair. What is troubling, however, are the not uncommon instances when women -- including public figures and officials -- are defamed in some relation to their sexuality. (In this sense, things appear not to have changed very much). That is, a male politician may be accused of adultery, while a woman may be labelled a "whore."²⁶ Truth being a defense to a libel charge, the defendant in the former case may be able to prove the simple charge of adultery. Proving the truth (or, for the plaintiff, falsity) of someone being a "whore" is much more difficult. As noted in Chapter 4, such a characterization is not easily quantified, and the exercise of proving or disproving it may open the woman's entire private life to examination in the courtroom. Furthermore, if the vehicle of parody, satire, or humor is used to make the point -- as seems more often to be the case with women and sexual matters -- the publication may not even be found to be defamatory.

One constitutional development that may be seen as positive for private plaintiffs -- which, of course, still includes many women (certainly more women than men) -- is that after the Supreme Court's decision in *Dun & Bradstreet*, reputational damage is presumed from the plaintiff's proof of defamation. This ruling recognizes the difficulty for these plaintiffs, e.g., the average housewife (or for that matter house-husband) of proving the tangible consequences of defamatory speech -- as opposed to those in the public sphere who might be able to prove

²⁶ Consider the discussion of press coverage of MP Clare Short in Chapter 4, Sect. V. Contrast that with, for example, the press coverage of David Mellor's adulterous affair.

damages by demonstrating the manifest consequences of their altered perception in the market.

Judicial attitudes toward and handling of the tort of invasion of privacy also reveal certain gendered patterns. Particularly telling are judges' and juries' assessments of that which is sufficiently private that when exposed, it may form the basis of a cause of action. In the context of so-called publication of private facts cases, it seems that female plaintiffs may have a harder time making out such a case. This may be based on the wide-spread association of women with the private (domestic/family/sexual) sphere such that when something private is revealed about them, it does not so easily shock or offend, nor does it appear worthy of redress. To the contrary, it appears consistent with women's essential nature. Another particularly interesting context for discussion of the privacy tort in relation to women relates to the disclosure of a rape victim's identity. The current U.S. law on this issue basically holds that if the name is a matter of public (e.g., police) record, it may be published; if it is not, but nevertheless is obtained lawfully, it also may be published. Significantly, the U.S. Supreme Court majority opinions in the two germinal cases have not acknowledged the special stigma associated with rape, but rather have treated these cases essentially like those involving media coverage of other crimes. This seems particularly ironic in light of the fact that such a publication would be considered defamatory -- even though the raped woman, admittedly, has done no wrong. In other words, one tort is hyper-sensitive to the gender issue, understanding the social stigma associated with rape; the other virtually ignores that dynamic.

V. THE FEMINIST ANALYSIS OF CONSTITUTIONAL DOCTRINES AFFECTING HATE SPEECH

As discussed in Chapter 3 on Extremist Speech, the current U.S. constitutional matrix in which hate speech is analyzed fails to acknowledge the harms of such speech. If

speech is characterized as being of a certain type, e.g., obscene, it is not protected by the First Amendment and can be regulated. All other categories of speech are protected, full stop, with no further analysis of harms or consequences arising from such speech being necessary. This truncated analysis, in which free speech always trumps, has obscured and diverted attention from the injuries that may be caused by such protected speech, including sexually hateful speech and pornography that does not rise to the level of obscenity.

One of the types of speech that is considered even more valuable than most in U.S. First Amendment jurisprudence is political speech. And, if I had to say whether or not misogynist speech is "political speech," I would probably conclude that it is. This does not mean, however, that I would consider it of the highest value -- or accord it the greatest degree of protection -- in a hierarchy of speech. At least I would not do so currently because I do not believe that speech of this sort -- in part because it is not what it purports to be -- can be responded to effectively in the market-place of ideas. As I have explained elsewhere, I believe that the speech is a political comment on the proper role of women. This kernel of message or meaning, if you will, however, is usually not consciously discerned by the hearers of such speech.

Granted, even with this objectionable meaning aside for a moment, what hate speech appears to be looks pretty bad. It looks at best uncivil, at worst an assault. Writers have varyingly called it ideologically vapid and pure hate that "express[es] phonetically . . . disgust and violence."²⁷ Because commentators have typically assumed that such speech is purely emotive with little or no meaning, they have not been concerned about its existence in the "marketplace of ideas." They have not worried about its presence in public discourse based on their belief that

²⁷ Katz v. Dole, 709 F.2d 251, 254 (4th Cir. 1983).

it makes no actual contribution to the discourse.²⁸ (As I will come back to in a moment, I believe this conclusion is only half right.) Even among those who may consider such communications vulgar and offensive, the communications are seen nevertheless as not substantive. Indeed, based on this assumption, to the extent that courts and commentators have considered the harms of such speech at all, they have considered its harms on that basis, namely as psychic or emotional injury.

I believe, however, that the "embedded" meaning of such sexually hateful speech is also of considerable concern. In particular, I believe that because the message is a covert one, it is more difficult to counter and perhaps cannot be effectively rebutted in the marketplace of ideas. First of all, sexually hateful speech is a conversation stopper. It does not invite meaningful discourse about anything, certainly not the role of women. Second, its covert message, as I have already concluded, is that women are lesser beings than men; they should be subservient to men; and their place is not in the public sphere of life. This message plugs in nicely -- is consistent with -- the numerous other covert messages that we receive every day about women, their worth, and their proper roles.²⁹ We are told that women can choose to do anything they wish, but we don't see many women in leadership roles or positions of power; certainly very few women occupy top echelons of power. Besides, old biases die hard, and the idea of women as the lesser or inferior sex

²⁸ The same has been said of pornography. But see David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111, 124-31 (1994).

²⁹ Consider, for example, how many times every day we hear or read the male pronouns "he," "him" or "his" -- rather than their feminine equivalents -- as the default pronouns, the norm used to refer to people of both sexes. This linguistic practice sets women aside as the "other", while men and the masculine are the standard.

has been around for a very long time.³⁰ The message of hate speech is powerful precisely because it is consistent with the stereotypes most people hold of women.³¹ While these stereotypes are believed or held with varying degrees of strength, the misogynist message nevertheless cues to and bolsters them. Although our current politically correct climate discourages open deviation from the official truth of gender equality, there are plenty of people who would justify both legal and social gender differentiation in a variety of contexts. When they state these positions and, in addition, back them up with a statement of their reasons, it is clear what they are proffering into the marketplace of ideas. Accordingly, such comments and ideas can be taken at face value and responded to in that marketplace. When, however, the messages are covert -- as in the form of sexually hateful speech -- countering them and thereby avoiding the injury associated with the message (as opposed to the psychic or emotional injury associated with its form) may be much more difficult.

VI. THE FEMINIST ANALYSIS OF FREE SPEECH THEORY

The feminist critique of free speech is in many ways similar to and draws upon the critique of possessive individualism³² and the communitarian critique of individual rights and liberalism.³³ Cultural feminism, for exam-

³⁰ See generally Schroeder, *Feminism Historicized*, *supra* note 3; CAMILLE PAGLIA, *SEXUAL PERSONAE: ART & DECADENCE FROM NEFERTITI TO EMILY DICKINSON* (1990).

³¹ Paul Chevigny, *Pornography and Cognition: A Reply to Cass Sunstein*, 1989 DUKE L. J. 420, 426.

³² See, e.g., Joan Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989); Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981); Fran Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEXAS L. REV. 387 (1984).

³³ See generally Peter Gabel, *The Phenomenology of Rights Consciousness and the Pact of the Withdrawn Selves*, 62 TEXAS L. REV. 1563 (1984); Staughton Lynd, *Communal*

ple, reflecting values of connectedness and relation, resembles the communitarian critique of liberalism,³⁴ while the current rights-based theory -- operating from an individualist perspective -- reflects priorities that have long been associated with men and the masculine.³⁵ This rights-based approach often overlooks the fact that people enjoy enormously disparate degrees of social and economic power in our society, and the value of the right to free speech to a given person is often commensurate with his or her degree of power. Like a lot of other less powerful people in society, women therefore often get less for their right, so to speak; they have less access to credible and mainstream media outlets. Furthermore, what a woman says -- whether in the media or at a town council meeting or to a next-door neighbor -- may be discounted because a woman says it and/or because women express themselves in a style or language that is not appreciated and is not always cognizable in dominant discourse. As one commentator has written, the free speech principle's "seeming embodiment of individual power and democracy masks powerlessness and society's refusal to allow real participation in the decisions that affect our lives."³⁶

Rights, 62 TEXAS L. REV. 1417 (1984); Robert Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CAL. L. REV. 297 (1988); Sparer, *Fundamental Human Rights, Legal Entitlement and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509 (1984); Note, *A Communitarian Defense of Group Libel Laws*, 101 HARV. L. REV. 682 (1988).

³⁴ See, e.g., Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 542, 579-84 (1986); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 14-26 (1988). Radical feminists, including Catherine MacKinnon have also condemned liberalism.

³⁵ See Robin West, *supra* note 34, at 5-7.

³⁶ David Kairys, *Freedom of Speech*, at 265 in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE*, (D. Kairys, ed.; 2d ed. 1990).

I have discussed in this thesis various philosophical justifications for the free speech right: self-fulfillment, the argument from democracy, and the market-place of ideas. A number of questions come immediately to mind when considering these theories from a feminist perspective. For example, how does the "marketplace of ideas" work to discern the "truth" if and when women are speaking in a different voice³⁷ and accordingly fail ever to be understood in the dominant political and legal discourse seeking to discern that truth? Furthermore, the market-place of ideas assumes that some reality or truth is objectively ascertainable, an assumption that feminists question, arguing that knowledge and truth is "socially constructed"³⁸ and may vary from person to person or group to group.

As for the self-fulfillment rationale, feminists might question whether the self-fulfillment of women, although typically associated with the private, domestic, and lesser sphere of life, is as worthy a goal as the self-fulfillment of men, who typically have been associated with the public sphere and expression about the "weightier" matters of political decision-making. If we do take women's self-fulfillment seriously, how are we to respond to misogynist speech that may be self-fulfilling for a man while diminishing (if not destroying) a woman's potential for self-fulfillment by discouraging her from speaking at all? Such speech might also thwart women's self-fulfillment by discouraging them from pursuit of other activities that

³⁷ The obvious reference is to Carol Gilligan's germinal work, *IN A DIFFERENT VOICE*, examining the differences between feminine and masculine ways of making decisions--particularly those involving moral choices. However, a number of polemicists and scholars have expanded upon the basic notion that because women's concerns have not traditionally been addressed in male law-making and in the male world, when women earnestly enter the arena of legal debate, they often are ridiculed and misunderstood.

³⁸ For an excellent article on this point, see Susan Williams, *Feminist Jurisprudence and Free Speech Theory*, 68 *TULANE L. REV.* 1563 (1994).

might contribute to their self-fulfillment. As a related matter, we must consider whether women, absent a fora in which their concerns, ideas and stories are taken seriously, can achieve self-fulfillment from free speech in the context of a patriarchal society.

As for the argument from democracy theory, which is especially concerned with the protection of political speech, such protection would arguably be greatly expanded based upon the feminist motto that "the personal is political"³⁹ and a recognition that democratic decision-making impacts a great deal more than ostensibly public matters. It therefore invites an acknowledgement of the power structures of the private, as well increased regulation of the private sphere. On the other hand, what I see as the political message (its sub-text, anyway) of misogynist speech would also lead to its protection under this theory.

My essential point is that the authors and proponents of these justifications for the primacy of the free speech ideal have not considered the emptiness of the right for those persons, including women, who do not enjoy genuine equality in our society. In order to advance the welfare of women, women must learn how to make the libertarian free speech idea work for them by somehow getting more social power. Indeed, I believe as women continue to gain such power, they will be able to make more effective use of this right. Alternatively, or at least until women do gain more

³⁹ This motto refers to the fact that feminists have not been reluctant to draw on their own personal experiences--on the experiences of all women--as they perceive them. In fact the so-called radical feminists have attempted to revamp mainstream methodology in accordance with their perceived importance of drawing on women's experiences as women have perceived them. The method is known as "consciousness raising" and offers a persuasive critique of the purported objectivity of (masculine) scholarship. See generally CATHERINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* ch. 6 (1989); Elizabeth Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986). This motto also refers to the related feminist idea that for women, their personal world, which may appear private, is their political.

power, they should seek a re-thinking of First Amendment principles and doctrines so that women's voices, as well as their injuries, are not ignored by its analysis of speech, from the obscene to the defamatory to the extremist.

VII. CONCLUSION

The question remains whether feminist jurisprudence or the broader women's movement can define a "coherent, normative vision susceptible of transformation into legal theory."⁴⁰ But perhaps we can avoid answering that question -- or even if we must answer it in the negative -- doing so does not mean that feminist legal scholars' efforts have been for naught. As I said at the outset, it is not necessarily the purpose of feminist legal scholarship to articulate a new normative jurisprudence. As critical at least for now is the project of revealing the ways in which the law fails women, keeping in mind that these observations are always situated in a given place and time. Nevertheless, we cannot be entirely content with cultural, or perhaps more precisely in this context, gender relativism. As Prof. Susan Williams has said, "Relativism . . . is [] insufficient to meet the purposes of feminism. Feminists must be able to say that gender oppression is wrong, not just that their perspective on it is one valid approach among many."⁴¹

To the extent the legal regulation of speech fails women, women must be willing to engage the law where it is and to confront it with the effect of laws that do not work for women -- or worse still, that work against them. We must shape the law in away that recognizes injuries peculiar or more common to women. At the same time women

⁴⁰ Marie Ashe, *Mind's Opportunity: Birthing a Poststructuralist Feminist Jurisprudence*, 38 SYRACUSE L. REV. 1129, 1133 (citing Robert Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983)).

⁴¹ See Williams, *Feminist Legal Epistemology*, *supra* note 5, at 88.

should press for social change that empowers women, change that could make the free speech right more meaningful and useful to women, while also taking some of the sting out of sexually hateful speech.

* * *

VIII. POSTSCRIPT

How often the story we tell is not the one the listeners hear. Judy Scales-Trent⁴²

I conclude with some thoughts about my law review story -- related in the introduction to this thesis -- which have been informed by my work on this project.

First, I am convinced that the poster was intended as a message to women, and to me in particular, to "know your place." Of course the men who put up the poster may not have been conscious of this message, disguised as it was in their crass "joke." Nevertheless, I feel sure that the men who put up the poster were, in effect, announcing their opinion that a woman's place is not as editor-in-chief of the law review, or more generally, that a woman's place is not in a leadership position in the public (market) sphere of life. This being the sort of statement which, in light of today's formal guarantees of equality of the sexes (to which I feel certain, especially as lawyers, they would pay lip service), these men could (or would) not come out and proclaim, they masked it with so-called humor. This "disguise" afforded the message two benefits it might not have enjoyed otherwise. First, the supposedly humorous form thwarted effective response to or countering of the essence of their message, which allowed it to gain force -- and, in combination with existing attitudes, to prevail --

⁴² *Using Literature in Law School: The Importance of Reading and Telling Stories*, 7 BERKELEY WOMEN'S L.J. 90 (1992).

in the limited market-place of ideas of the law school.⁴³ Second, the speech *injured* me and some other women in a way that a rational, albeit unabashedly sexist, statement about the role of women would not have done. It angered me, it hurt my feelings, and it made me feel that I, along with my professional achievements, was being threatened on the basis of my sex. It made me feel I did not belong in the law school. I believe there were other female members of the law review and of the broader student population who shared aspects of this injury.

Further, most of my responses to the incident could be considered typically "feminine": I cried (often and in public, no less), and I chose not to "play hardball" by asserting myself and demanding a response from the law school administration. The only time I was vocal to the collective faculty was at the appeal regarding the honor code violation, and at that point, with a great deal stake and at the end of the year from hell, I daresay I was hysterical.

I am under no illusion that these responses assisted my cause in any way; I am quite certain that they undermined my credibility and the seriousness of the injury in the eyes of certain decision-makers in the law school. First of all, the crying probably caused me to be seen as essentially a "girl with hurt feelings," an injury that neither the law nor many other institutions takes very seriously. If I had demanded an apology from the men or some formal response from the law school -- if I had been completely confrontational and adversarial as perhaps a man would more likely have done -- I probably would have gotten a response.⁴⁴ Ironically, my one action or statement

⁴³ In this sense, I would say, it is similar (in form, not necessarily substance) to the message of the parody that was at issue in *Hustler Magazine, Inc. v. Falwell*, discussed supra at Chapter 4.

⁴⁴ I recall that the Black Law Students Association, later during the 1988-89 academic year, threatened to "go public" with a racist incident at the law school unless the

throughout the scenario that was assertive and in that sense might be considered "masculine" -- though just barely -- taking down the poster and stating that such behaviour would no longer be tolerated in the law review office -- is the very move that kept the whole affair from just going away. It is the very thing that I believe provoked the further harassment.

The paradox is that I was damned on the basis of both my feminine and masculine actions. The "masculine" competitiveness that led me to seek the editor-in-chief's role, that led me to seek a leadership position in a male-dominated arena, brought the gendered attack on women law review members, and my initial "masculine" confrontational response to the poster created the row. Coming from a man, I have no doubt that this would have been seen as leadership, not trouble-making. But, the "feminine" manifestations of my injury were not readily cognizable to the establishment, and my "feminine," non-confrontational response to the harassment made it easy for the law school to ignore my plight. If I had it to do over, I would follow up on my initial assertiveness. I would formally request a response from the law school administration and if I failed to get one, I would call the New York Times.

I analyzed cursorily in the introductory chapter the legal causes of action that I might have had available to me had I wished to pursue them. Having now, in this thesis, more thoroughly analyzed these laws, I believe that my initial hunches about the judicial system's likely response to my experience were pretty accurate. Intentional infliction of emotional distress would likely have been the tort action to serve me best -- or defamation might

law school administration officially denounced the objectionable incident. The law school publicly condemned the incident.

have worked⁴⁵ -- but a great deal would have been dependent on the fact finders' determinations. Intractable from those determinations would have been the fact finders' assumptions about women, men, and appropriate gender roles, as well as their individual pre-dispositions -- shaped by various experiences and characteristics, including gender -- about what is and is not sufficiently "outrageous" to be actionable.

The cause of action whose precedents show the greatest sensitivity to what I experienced is the U.S. federal law on sexual harassment. Of course, as already noted, I did not have this cause of action available to me because I was not in an employment setting. Nevertheless, it is in the recent evolution of this action that my experience could otherwise be most comfortably situated, and where the law, in its current state, would most likely recognize my injury. That is, the speech was arguably directed at me as an individual, especially in its naming me the only "candidate" for "Head Slut." And the poster, along with preceding and ensuing incidents, arguably created an "abusive, hostile or offensive" working environment (albeit, as already mentioned, not an employment one).⁴⁶ Certainly, I was initially targeted on the basis of my sex; even though the subsequent acts of harassment were not overtly sexual, I was the target of them because of my sex, and that satisfies the law of sexual harassment.⁴⁷

When I consider more closely why the poster had such a powerful impact on me, when I consider its power to injure with tangible consequences, I inevitably conclude that it has everything to do with the gender biases that are so deeply imbued in our society. I reach the same

⁴⁵ Cf. *Smith v. Atkins*, 622 So. 2d 795 (La.App. 4 Cir. 1993) (law professor who called female students a "slut" in class found liable for defamation).

⁴⁶ *Meritor Savs. Bank v. Vinson*, 477 U.S. 57 (1986).

⁴⁷ See *Hall v. Gus Construction Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988).

conclusion when I consider why my articulation of why the poster was objectionable and unacceptable was ineffective at countering the poster's message. We live in an ostensibly egalitarian society, but one in which females, no matter how enlightened their parents, no matter how progressive their educations, grow up realizing on some level that society does not value them as highly as men -- women are the "other" to man, who is standard, normative. Females do not grow up *assuming* that they will become professionals like lawyers; they may aspire to, and they may know that there are no longer formal barriers to prevent them from doing so, but very few walk into law schools (or medical schools or engineering colleges or trade workshops or science laboratories) with the same sense of belonging that men more typically possess.⁴⁸ I certainly did not. I knew that in law school I would struggle to prove myself, but I believed that with hard work it could be done, and I was right. Because of the success I had enjoyed in my academic and other pursuits at university, I, too, was surprised at the blow the poster dealt me. The incident brought me face to face with the fragility of my own confidence, which I had previously perceived to be genuine.

My essential point is this. The lack of authentic gender equality in our society was, in a sense, a double culprit in the incident I have described. First, it was the lack of true equality that led certain male law review members to attack certain female law review members on the basis of their gender by implying that women are only fit for certain roles -- roles associated with sex. Secondly, that same lack of equality exacerbated the injury that I

⁴⁸ See generally Lani Guinier, Michelle Fine, and Jane Balin, *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1 (1994); see also generally Deborah Rhode, *The "No Problem" Problem*, *supra* note 7; LINDA TSCHIRAHART SANFORD AND MARY ELLEN DONOVAN, *WOMEN AND SELF-ESTEEM* 37 (1984) (citing CARYL RIVERS, ROSALIND BARNETT AND GRACE BARUCH, *BEYOND SUGAR AND SPICE: HOW WOMEN GROW, LEARN AND THRIVE* (1979)).

incurred from the poster -- an injury that, in the context of authentic and meaningful gender equality might have been relatively minor, with few or no tangible consequences for me. Until everyone -- male and female -- truly endorses and incorporates gender equality into their lives, in their treatment of others, sexually hateful speech will continue to inflict injury on those who, while not necessarily powerless, enjoy less power than the dominant group. As Prof. Susan Williams has said, "[h]ate speech is so dangerous precisely because of the existence of deep gender inequality and injustice along particular lines in our society."⁴⁹

For now, messages like the one in the poster, silence women. Because of this, I would argue that it forfeits some of its claim, as speech, to First Amendment protection. Free speech is not free in the sense that it costs nothing; in the incident I have described it cost me plenty. I would argue that it was also costly to women collectively. How, one may ask? I cannot honestly say that my career has suffered as a direct consequence of the incident and its aftermath. Indeed, several of my friends have accentuated the positive: experiencing incidents such as these provides us with important insights for research and thought; this one arguably provided me with a lifetime agenda if I want to make it that.⁵⁰ But still I would argue that the poster and ensuing incidents of harassment, unredressed as they were, ignored by the law school administration, had short term as well as long term negative consequences. They sent a message to all in the law school community that such harassment would not be shamed, let alone punished. They sent the message that the law school administration did not care whether the law school was a

⁴⁹ Susan Williams, *Feminist Jurisprudence and Free Speech Theory*, 68 TULANE L. REV 1563, 1579 (1994).

⁵⁰ This is all true, although I will stop short of expressing thankfulness to those responsible for the poster.

congenial learning environment for women. They sent the message that a woman who was publicly labelled a "slut," apparently in retaliation for excelling, was on her own. I daresay these messages deterred women in the law school community at the time from realizing their full potential, from seeking leadership positions they might otherwise have sought.⁵¹ I know that for a time it caused me to experience diminished ambition.⁵² Indeed, when I am in settings where I believe such misogynist feelings may be lurking below the surface, and where as an admitted feminist I am part of a tiny minority, I am cautious not to provoke. This is so even when the prospective retaliation would

⁵¹ It is interesting to recall that when I decided to pursue the position of editor-in-chief, a couple of my law professors commented that it was unusual that, if selected, I would be only the second woman to serve in that capacity. They commented that several women students had, in the past, been at the top of their respective classes, and it was odd that only one other had become editor-in-chief, and that very few had sought the position. Considering my experience, I think I now understand at least one of the reasons that few women had ever pursued the post. Perhaps they were simply acting consistently with the dominant group's expectations of them. Similarly, it is not surprising that only one woman has served as editor-in-chief since my tenure in that position.

⁵² This is consistent with what Marcy Strauss has written.

And sexist speech does hurt. It is an affront to individual dignity. Victims of such speech report feelings of personal anguish and powerlessness. Most victims experience isolation, decreased job satisfaction and diminished ambition. Many experience physical manifestations of the emotional harm. Ninety percent of sexual harassment victims in one survey experienced nervousness, fear and anger, while sixty-three percent complained of nausea, headaches and exhaustion.

Marcy Strauss, *Sexist Speech in the Workplace*, supra note 1, at 12 (citing Littleton, *Feminist Jurisprudence: The Difference Method Makes*, 41 STAN. L. REV. 751, 775 (1989); numerous cases in which these injuries were noted; and Working Women's Institute, *The Impact of Sexual Harassment on the Job: A Profile of the Experiences of 92 Women*, Research Series Report No. 3 (1979)).

never be as bald-faced as that in the law review incident, but where it might be some subtle undermining of my credibility. So, it is fair to say that I learned a valuable lesson. I do not mean a lesson learned in the way a child does: doing something wrong and learning not to do it again. No, my lesson was an awakening to the still extant menace of misogyny and gender bias that threatens women's quest for authentic equality, credibility, and power.

In the free and just society that we aspire for the United States to be, the right to speech is just one right in an array of many that we should protect. Until we commit ourselves to gender equality in the same way that the U.S. Supreme Court has committed itself to the free speech principle, misogynist speech will remain a social force to be reckoned with by those committed to advancing the situation of women.

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A SURVEY OF FEMINIST JURISPRUDENCE

*Lisa R. Pruitt**

“Feminist scholarship makes sense only in the context of an overwhelmingly sexist science.”

Margit Eichler

The Double Standard: A Feminist

Critique of Feminist Social Science (1980)

One of the earliest recorded uses of “feminist jurisprudence” was at a 1978 Harvard Law School celebration commemorating the twenty-fifth anniversary of the institution’s first women graduates.¹ A panel of judges, lawyers, and legal educators at that event debated the most basic of questions regarding the enterprise: Was there in existence or should there be developed a feminist jurisprudence? Apparently the consensus reply to both queries was then no, perhaps in part because the label invoked images of political cries for special legal treatment for women.²

In spite of that early rejection of the project’s “packaging” and imperative, a feminist jurisprudence—both movement and dis-

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1. Carol Smart asserts that feminist jurisprudence originated in the nineteenth century, even though such a concept was not recognized by the feminists of that era. Women’s movements then had their grounding in the liberal philosophy of equal rights, protesting material restrictions upon women such as bars to educational and political opportunities. See Carol Smart, *Feminist Jurisprudence*, in SUPPLEMENTARY JUSTICE (Peter Fitzpatrick ed., 1990) [hereinafter Smart, *Feminist Jurisprudence*].

2. See Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN’S L.J. 191, 193 (1989) [hereinafter Cain, *Grounding the Theories*] (attributing to Professor Ann Scales, then a Harvard law student, who moderated the debate); Ann C. Scales, *Towards a New Feminist Jurisprudence*, 56 IND. L.J. 375 (1981) [hereinafter Scales, *New Feminist Jurisprudence*]. See also Kathleen A. Lahey, . . . *Until Women Themselves Have Told All They Have to Tell . . .*, 23 OSGOOD HALL L.J. 519, 520, 524 (1985) [hereinafter Lahey, *Until Women Themselves*] (quoting MARGIT EICHLER, *THE DOUBLE STANDARD: A FEMINIST CRITIQUE OF FEMINIST SOCIAL SCIENCE* (1980) (noting the argument against feminist legal theory that it is not really scholarship because it is too overtly political to be anything other than polemic).

Although I am uncertain about all the reasons why this particular panel at

cipline in one—has emerged.³ It is at once a critique within legal scholarship and education and a challenge to the structure of those institutions.⁴ To call it a movement is to acknowledge that it adopts an admitted and self-consciously critical stance toward orthodox jurisprudence and is focused upon the common goals of raising the law's awareness and understanding of, as well as its responsiveness to, women as women.

To label it as a discipline, however, is not to imply that it is organized around a single theory.⁵ Consistent with feminist goals in other contexts, much feminist jurisprudence avoids "theory" altogether, choosing instead to focus upon the practical reality of women's experiences and concerns. In fact, one of the only remaining unifying themes of feminist jurisprudence—yet still one about which different strands vary as to its centrality and importance—is that women's experience must be revealed and communicated.⁶ The women's "truths"⁷ revealed in turn provide a stance from which one

Harvard rejected the need for a feminist jurisprudence, British sociologist Carol Smart has articulated her own reason for rejecting the concept. She asserts that any search for feminist vision that can help reform the law is idealized, noting that only when the "central role of law as an organizing principle of everyday life is . . . challenged" can we rebut the assumed need for some form of jurisprudence. See Smart, *Feminist Jurisprudence*, *supra* note 1, at 17.

3. Interestingly, as recently as two or three years ago, some denied that a feminist jurisprudence had yet developed, preferring to refer to it as "feminist legal theory." See, e.g., Cain, *Grounding the Theories*, *supra* note 2, at 194 n.12; Adrian Howe, 'Social Injury' Revisited: Towards a Feminist Theory of Social Justice, 15 INT'L J. OF SOC. OF LAW 423, 428 (1987) [hereinafter Howe, 'Social Injury' Revisited]; Christine A. Littleton, *In Search of a Feminist Jurisprudence*, 10 HARV. WOMEN'S L.J. 1 (1987) [hereinafter Littleton, *Search*]; Jenny Morgan, *Feminist Theory as Legal Theory*, 16 MELB. U. L. REV. 743 (1988) [hereinafter Morgan, *Feminist Theory as Legal Theory*]. Other less recent admissions of the struggle to develop this area include Catharine MacKinnon, Panel Discussion, "Developing Feminist Jurisprudence," at the 14th National Conference on Women and Law, Washington, D.C. (April 9, 1983), *quoted in* Heather Ruth Wishik, *To Question Everything: The Inquiries of Feminist Jurisprudence*, 1 BERKELEY WOMEN'S L.J. 64 (1986) [hereinafter Wishik, *To Question Everything*]; Scales, *New Feminist Jurisprudence*, *supra* note 2.

4. Littleton, *Search*, *supra* note 3, at 2.

5. See generally John Shotter & Josephine Logan, *The Pervasiveness of Patriarchy: On Finding a Different Voice*, in *FEMINIST THOUGHT AND THE STRUCTURE OF KNOWLEDGE* (Mary McCanney Gergen ed., 1988) (questioning whether a distinctly feminist practice or comprehensive mode of thought can exist in our patriarchal culture).

Although feminist jurisprudence generally is not centered on one theory, some individual strands of it represent meta-narrative, such as MacKinnon's brand of radical feminism. See *infra* text accompanying notes 75-93.

6. See *infra* notes 102-15 and accompanying text (discussing methodology and epistemology); accord Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 621 (1990) [hereinafter Rhode, *Critical Theories*].

7. It is important to note that many feminist legal theorists reject the potentiality

can, and a basis upon which one may, critique the method, procedure, and substance of the law, offering both supplementation and correction. Feminist legal scholars frequently write in reformist terms—"of challenging, subverting, or transforming legal relations at their core."⁸ They question vested interests, uproot familiar and comfortable perspectives, and defy the status quo.⁹ They are suspect of the highly structured nature of legal method, the form and patterns of legal inquiry and decision-making, and legal "ways of knowing."¹⁰

As feminist jurisprudence has developed in the last decade, the label has continued to be somewhat problematic. It has been referred to as an "oxymoron"¹¹ and a "conceptual anomaly"¹² and likened to "a modern quest for the Holy Grail."¹³ The common theme of these commentators—most of whom are not hostile to the movement/discipline—is that the traditional, dominant jurisprudence is so masculine that any feminist perspective on it is inaccurate or, at best, strictly marginalized in the current patriarchal society.¹⁴ Some carry

of discovering any single unifying "women's" truth, although they believe that each individual woman may discover her own truth through methods such as consciousness-raising. See *infra* notes 103-07 and accompanying text.

One of the paradoxes of feminist jurisprudence is reflected here: the conflict of individuality of experience among women with the search for a unifying experience from which we can formulate an agenda for legal change.

8. Littleton, *Search*, *supra* note 3, at 2.

9. See generally Mary Jane Mossman, *Feminism and Legal Method: The Difference it Makes*, 3 WIS. WOMEN'S L.J. 147 (1987) [hereinafter Mossman, *Feminism and Legal Method*] (quoting A FEMINIST PERSPECTIVE IN THE ACADEMY: THE DIFFERENCE IT MAKES (E. Langland and W. Gove eds., 1981)).

10. See *id.* at 149, 167; see generally Katherine Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990) [hereinafter Bartlett, *Feminist Legal Methods*]; Cain, *Grounding the Theories*, *supra* note 2; Lahey, *Until Women Themselves*, *supra* note 2, at 527; Dennis Patterson, *Postmodernism/Feminism Law*, 77 CORNELL L. REV. 254 (1992) [hereinafter Patterson, *Postmodernism/Feminism*]; A. W. Phinney III, *Feminism, Epistemology and the Rhetoric of Law: Reading Bowen v. Gilliard*, 12 HARV. WOMEN'S L.J. 151 (1989).

11. Ann C. Scales, *Militarism, Male Dominance and Law: Feminist Jurisprudence as Oxymoron?*, 12 HARV. WOMEN'S L.J. 25 (1989).

12. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 4 (1988) [hereinafter West, *Jurisprudence and Gender*].

13. Smart, *Feminist Jurisprudence*, *supra* note 1, at 17 (citing CAROL SMART, *FEMINISM AND THE POWER OF LAW* (1989)). As Moira Gatens has written in a theoretical context, "there cannot be an unadulterated feminist theory which would announce our arrival at a place where we could say we are 'beyond' patriarchal theory and patriarchal experience." Moira Gatens, *Feminism, Philosophy and Riddles Without Answers*, in FEMINIST CHALLENGES 26 (C. Pateman & E. Gross eds., 1986).

14. For example, Catharine MacKinnon has asserted that the female cannot articulate her own definitions, goals or thoughts "because his foot is on her throat." Ellen C. DuBois et al., *Feminist Discourse, Moral Values, and the Law—A Con-*

the argument a step further, asserting that the establishment or endorsement of any form of jurisprudence is antithetical to feminism and that feminists should be challenging the "central role of law as an organizing principle in everyday life."¹⁵

My¹⁶ discomfort with (but not outright rejection of) the "feminist jurisprudence" label stems from somewhat different concerns. In essence, I believe it may no longer accurately reflect the nature of the project—or at least what I believe the project should be and do. First, it evokes images of an "us-them" mentality, which contributes to the misunderstanding and defeat of the enterprise, as well as to the continued isolation of women. Just as it defines, it also marginalizes. Secondly, I agree with Katharine Bartlett, who has asserted that use of the "feminist" label provokes assumptions of a standard woman; it is a "fixed, exclusionary, homogenizing, and oppositional" term—one embracing an essentialism that feminists

versation, 34 BUFF. L. REV. 11, 74 (1985) [hereinafter DuBois et al., *Feminist Discourse, A Conversation*] (emphasis added). See also Mossman, *Feminism and Legal Method*, *supra* note 9, at 148-49 (questioning the extent to which feminist theory can impact the structure of legal inquiry); Janet Rifkin, *Toward a Theory of Law and Patriarchy*, 3 HARV. WOMEN'S L.J. 83, 84 (1980) (noting that because law plays a "primary and significant role in social order" it is powerful as both a "symbol and vehicle for male authority"); West, *Jurisprudence and Gender*, *supra* note 12, at 4 (explaining that feminists take women's humanity seriously, but jurisprudence and law do not, and until this changes "feminist jurisprudence" is a political impossibility). But see Cain, *Grounding the Theories*, *supra* note 2, at 193-94 (asserting that women who have at some point rebelled against patriarchy have experienced at least "glimpses" of their own authenticity).

15. See Smart, *Feminist Jurisprudence*, *supra* note 1, at 17. Smart also criticizes the point at which "feminist jurisprudence becomes almost a messianic movement and [where] notions of the limits of the ability of law (whether feminist or not) to transform social reality are forgotten." Smart, *Feminist Jurisprudence*, *supra* note 1, at 19.

Most recently, commentators have begun to state this critique in political philosophy parlance: Feminists must bypass the modernist perspective of law—a system employing concepts of objectivity, truth, and reason—and embrace the post-modern perspective, with its themes of practice, critique, and localism. See Patterson, *Postmodernism/Feminism*, *supra* note 10.

16. My use of the first person throughout this article is purposeful. One important aspect of the feminist critique of law (as well as of the Critical Legal Studies movement) has been the expressed doubt of law's purported objectivity and an emphasis on feminist methodology. Such methodology admits the subjective, personal perspective. See, e.g., Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 886-87 (1989) [hereinafter Finley, *Gendered Nature of Legal Reasoning*]. Kathleen Lahey has commented on dominant ideology's "condemnation of feminist 'subjectivity' or 'polemic,'" noting that its "privileged stance of (universalist) male scholars gives them the authority to declare other scholars to be deficient in some crucial quality." Lahey, *Until Women Themselves*, *supra* note 2, at 526.

have criticized in dominant jurisprudence.¹⁷ Women of color, for example, have objected vigorously to such essentialism, decrying white, middle-class feminism's attempt to set a single standard, to state a single description of, and agenda for, all women.¹⁸

Moreover, because much of the current feminist jurisprudence posits a gender-oriented rather than sex-oriented analysis, it tends to perpetuate stereotypes—sometimes harmful ones—about the nature of women. This reinforces identification of women, or at least of the “feminine,” with certain characteristics and traits, an identification that, even if currently an accurate description, in the long run limits choices and possibilities for both women and men. Some scholars, perhaps sharing early reservations about embracing the “feminist” label, have begun to speak simply of gender and gendered analyses.¹⁹ I, however, am doubtful that this alternate label truly resolves the problem. While it is more politically palatable to many, it still implicitly adopts gender rather than sex, which (usually) determines gender, as the primary (and sometimes essential) category for analysis. It plays off of a feminine-masculine dichotomy, thereby representing the very sort of dualism rejected by many feminist scholars.²⁰

The substance of the project is, at any rate, at least as important

17. Bartlett, *Feminist Legal Methods*, *supra* note 10, at 834; Patterson, *Postmodernism/Feminism*, *supra* note 10.

18. See generally PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Anarchist Politics*, in *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER* 57 (Katherine T. Bartlett & Rosanne Kennedy eds., 1991); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, in *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER* 235 (Katherine T. Bartlett & Rosanne Kennedy eds., 1991); Marlee Kline, *Race, Racism, and Feminist Legal Theory*, 12 *HARV. WOMEN'S L.J.* 115 (1989); see also DEBORAH L. RHODE, *JUSTICE AND GENDER* (1989); Rhode, *Critical Theories*, *supra* note 6.

19. See generally, e.g., RHODE, *JUSTICE AND GENDER*, *supra* note 18; West, *Jurisprudence and Gender*, *supra* note 12; Joan C. Williams, *Deconstructing Gender*, 87 *MICH. L. REV.* 797 (1989).

20. See Patterson, *Postmodernism/Feminism*, *supra* note 10.

Labelling may, at the outset, seem an insignificant issue. Leslie Bender has opined, however, that labels are divisive and cause ideas to “become fixed instead of remaining fluid and growing.” Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 *J. LEGAL EDUC.* 3, 5 n.5 (1988); see also Patterson, *Postmodernism/Feminism*, *supra* note 10. At this stage, however, they seem helpful, perhaps still necessary. And if feminist jurisprudence is able to achieve its goals, the issue will have been resolved, as the discipline/movement will have integrated and compromised traditional (patriarchal) jurisprudence so that it no longer needs a distinguishing signifier.

as the name, and I now turn to a brief historical overview of feminist jurisprudence. Following that, I discuss briefly some of the more prominent analyses within feminist jurisprudence, seeking to be particularly critical nor to provide novel insights, but rather to provide the feminist jurisprudence novice some rudimentary information. I also attempt to reveal some of the paradoxes within and among these strains in order to help formulate an agenda about feminist jurisprudence might best go forward.

I. A BRIEF HISTORY OF FEMINIST JURISPRUDENCE

Feminist jurisprudence began with an attempt to cure women's obscurity and even invisibility in the law. This was reflected in the "women *and* the law"²¹ approach of the 1970s, a strategy that soon demanded a shift in methodology as it became evident that to "add women and stir" was inadequate.²² These attempts were nevertheless helpful initially, as they drew attention to women and put some of women's concerns on the political agenda, being particularly instrumental in the early development of discrimination doctrine.²³ Carried to its logical conclusions, however, the approach often proved problematic because as the sameness versus difference and special treatment versus equal treatment debates evolved, women (along with what had been labeled "feminine" values) were usually evaluated by both male (biologically speaking) and masculine (socially speaking) standards.²⁴

21. See generally, e.g., SUSAN ATKINS AND BRENDA HOGGETT, *WOMEN AND THE LAW* (1984); Karen Offen, *Feminism and Sexual Difference in Historical Perspective*, in *THEORETICAL PERSPECTIVE ON SEXUAL DIFFERENCE* (Deborah Rhode ed., 1990); Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984).

22. See, e.g., Wishik, *To Question Everything*, *supra* note 3, at 67-68 (arguing that mere inclusion is not the goal of feminist jurisprudence).

23. See generally RHODE, *JUSTICE AND GENDER*, *supra* note 18, at 81-107.

24. This dilemma is well reflected in the debate surrounding the quest for ratification of the Equal Rights Amendment to the U.S. Constitution. From 1972, when the U.S. Senate and House of Representatives passed the amendment, until the 1982 state ratification deadline, the campaigns for and against ratification often focused upon gender difference rather than upon gender disadvantage/hierarchy, conferring more importance upon formal rights than upon cultural context. See generally RHODE, *JUSTICE AND GENDER*, *supra* note 18, at 63-80, 306-07.

See also, e.g., ELIZABETH WOLGAST, *EQUALITY AND THE RIGHTS OF WOMEN* (1980); Cynthia Fuchs Epstein, *Faulty Framework: Consequences of the Difference Model for Women in the Law*, 35 N.Y.L. SCH. L. REV. 309 (1990); Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986); Ann E. Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913 (1983); Catharine MacKinnon,

The next wave of feminist analyses sought to overcome these limitations by shifting epistemological and methodological focus. Feminists found themselves unable to ignore methodology, having learned that challenging existing power structures with the same methods that defined those structures risked recreation of different, but equally illegitimate frameworks.²⁵ Included in these second-stage approaches have been relational or cultural feminism's "celebration of difference,"²⁶ radical feminism's gendered hierarchy/dominance framework,²⁷ and the public-private (market-family) dichotomy.²⁸ Other less prominent analyses have included variations on and even com-

Excerpts from MacKinnon/Schlafly Debate, 1 LAW & INEQ. J. 341-42 (1983); Elizabeth Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 634-35 (1986) [hereinafter Schneider, *Dialectic of Rights and Politics*]; Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts and Feminism*, 7 WOMEN'S RTS. L. REP. 175 (1982).

25. See Bartlett, *Feminist Legal Methods*, *supra* note 10.

26. See generally, e.g., CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982) [hereinafter GILLIGAN, *DIFFERENT VOICE*]; Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985) [hereinafter Menkel-Meadow, *Portia in a Different Voice*]; Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986); West, *Jurisprudence and Gender*, *supra* note 12.

27. See generally, e.g., CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989) [hereinafter MACKINNON, *FEMINIST STATE*] (constructing a theory of gender hierarchy and dominance); CATHARINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987) [hereinafter MACKINNON, *FEMINISM UNMODIFIED*]; RHODE, *JUSTICE AND GENDER*, *supra* note 18, at 1-6, 81-86, 305-21 (specifically preferring the term "gender disadvantage" to MacKinnon's "gender dominance"). See also Marie Ashe, *Mind's Opportunity: Birthing a Post-structuralist Feminist Jurisprudence*, 38 SYRACUSE L. REV. 1129 (1987) [hereinafter Ashe, *Mind's Opportunity*].

28. See generally, e.g., KATHERINE O'DONOVAN, *SEXUAL DIVISIONS IN LAW* (1985); SUSAN MOLLER OKIN, *JUSTICE, GENDER AND THE FAMILY* (1989) [hereinafter OKIN, *GENDER AND FAMILY*]; Nadine Taub and Elizabeth Schneider, *Perspectives on Women's Subordination and the Role of Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 117 (David Kairys ed., 1982); CAROLE PATEMAN, *THE SEXUAL CONTRACT* (1988); Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79 (1989) [hereinafter Dowd, *Work and Family*]; Elizabeth Fox-Genovese, *The Legal Status of Families*, 77 CORNELL L. REV. 992 (1992); Jane E. Larson, *The Sexual Injustice of the Traditional Family*, 77 CORNELL L. REV. 997 (1992); Francis Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983) [hereinafter Olsen, *Family and Market*].

See also SUSAN ATKINS AND BRENDA HOGGETT, *WOMEN AND THE LAW* 101-23 (1984); MARILYN WARING, *IF WOMEN COUNTED* (1988); Regina Graycar, *Hoovering as a Hobby: The Common Law's Approach to Work in the Home*, 28 REFRACTORY GIRL 22 (1985); Sylvia A. Law, *Women, Work, Welfare and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249 (1983).

binations of these.²⁹ A few merit independent mention, such as Tove Stang Dahl's "women's law," which incorporates what she calls realist, experiential method and social science.³⁰ Others include a social injury approach,³¹ and a standpoint/positionality approach, the latter generally advocating consciousness raising and legal narrative or story-telling as method, and focusing on women's experience to inform solutions.³² The categories are not static, and the doctrinal combinations are seldom simple.³³

29. One exception might be that stated by Robin West, who asserts that both radical feminists and cultural feminists implicitly embrace some version of what she calls a "connection thesis." This thesis is that "[w]omen are actually or potentially materially connected to other human life [while m]en aren't." West, *Jurisprudence and Gender*, *supra* note 12, at 14. West identifies this in cultural feminism's emphasis upon women's subjectivity, their value of intimacy, and their capacity for nurturing and care of "others" to whom they are connected. She identifies this in radical feminism's focus upon invasion and intrusion of the female body. West, *Jurisprudence and Gender*, *supra* note 12 at 15.

Furthermore, some commentators have found merit in both systems of thought, finding them not necessarily to be mutually exclusive. Jenny Morgan has written that both Gilligan and MacKinnon are correct—the former because theory about women's different approaches to problem solving validates the feelings many women have had about legal education and practice, and the latter because Morgan doubts that women are inherently different in their approaches to decision making and is skeptical that women would embrace such an ethic of caring if they really had a choice. See Morgan, *Feminist Theory as Legal Theory*, *supra* note 3.

30. See generally TOVE STANG DAHL, *WOMEN'S LAW—AN INTRODUCTION TO FEMINIST JURISPRUDENCE* (R.L. Craig trans., 1987) [hereinafter DAHL, *WOMEN'S LAW*]; Tove Stang Dahl, *Taking Women as a Starting Point: Building Women's Law*, 14 INT'L J. OF SOC. OF LAW 239 (1986) [hereinafter Dahl, *Taking Women as a Starting Point*] (addressing feminist perspectives within the tradition of black letter law). See also Agnete Weis Bentzon, *Comments on Women's Law in Scandinavia*, 14 INT'L J. OF SOC. OF LAW 249 (1986); Smart, *Feminist Jurisprudence*, *supra* note 1, at 1 (commenting upon Dahl's work).

31. See generally Howe, 'Social Injury' Revisited, *supra* note 3; Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989) [hereinafter Matsuda, *Considering the Victim's Story*].

32. See generally MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW* (1990); Bartlett, *Feminist Legal Methods*, *supra* note 10; Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7 (1987); Patterson, *Postmodernism/Feminism*, *supra* note 10.

33. An example of the complimentary nature of these various theories and analyses can be seen in Catharine MacKinnon's work. Although I categorize her as a radical feminist (as she herself does), she claims consciousness-raising as her methodological and epistemological approach, see *infra* notes 102-09, and she discusses the import of the public-private dichotomy's functioning in law, see *infra* notes 94-101. MACKINNON, *FEMINIST STATE*, *supra* note 27, at 182-94 (discussing abortion).

II. WOMEN AND THE LAW

Most early (c. pre-1980) writing about law's treatment of and attitudes toward women falls loosely within this category. Such writings usually addressed matters traditionally considered "women's issues," including rape, reproductive rights, and workplace discrimination. By this time, most "formal" barriers to women's political and professional participation had been dismantled, but situations unique to women—most related to their biological nature—still appealed for legal understanding and action. The U.S. Supreme Court had not, and still *has* not, accepted gender as a "suspect classification," thus failing to accord women the same degree of protection against discrimination that it has provided other groups that are vulnerable on the basis of their race, religion or national origin.³⁴ As women continued to experience harassment, disparate treatment, and unequal opportunities in different contexts—discrimination in forms for which the law provided no redress—they began to look for new solutions. Once again, an early strategy was to raise women's visibility,³⁵ to draw attention to their situations which, all too frequently, evinced their economic, social and even physical plight.

These activists did enjoy some successes. For example, even though *Roe v. Wade*,³⁶ the 1973 abortion rights decision of the U.S. Supreme Court, spoke in terms of the right of privacy rather than recognizing women's reproductive freedom, it was nevertheless a victory for women. Other achievements came in the area of rape law reform. Marital immunity from rape prosecution was abolished in some states,³⁷ and rape shield laws were adopted to suppress the salacious and irrelevant innuendo in rape trials.³⁸

Also contributing to the debate in the United States was the 1972 U.S. Senate and House of Representatives passage of the Equal Rights Amendment and the ensuing ratification contests in the individual states. Discussion and campaigns ultimately focused on

34. See generally JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW, 713-31 (2d ed. 1983).

35. The phrase "once again" is appropriate here because this task had already been accomplished, if only temporarily and partially, during the suffrage movement of the early twentieth century. See generally RHODE, JUSTICE AND GENDER, *supra* note 18, at 12-28.

36. 410 U.S. 113 (1973).

37. See generally SUSAN ESTRICH, REAL RAPE, 72-79 (1987) [hereinafter ESTRICH, REAL RAPE]; DIANNA RUSSELL, RAPE IN MARRIAGE, ch. 2 (2d ed. 1990) [hereinafter RUSSELL, RAPE IN MARRIAGE].

38. See generally ESTRICH, REAL RAPE, *supra* note 37, at 57, 88.

whether a formal prohibition against gender classifications would in fact improve women's legal status and lives. With these issues high on the political agenda and dominant in the media through the 1970s, it was not surprising that some legal scholars continued to seek legal solutions to women's problems. Nor was it surprising that the preferential-versus-equal treatment and sameness-versus-difference debates soon dominated the discussion.³⁹

III. CULTURAL/RELATIONAL FEMINISM

The same decade that saw the political activism of liberal feminists advocating equality within the law also, paradoxically, saw feminist academics in other disciplines rediscover and focus upon the differences between men and women.⁴⁰ The germinal work grounding what has become known as relational or cultural feminism is Carol Gilligan's 1982 book, *In a Different Voice*. Based on her research in developmental psychology, Gilligan posited that, contrary to previous studies, females are not inferior to males with regard to development of their moral decision-making faculties.⁴¹ In the "feminine" decision-making process, Gilligan identified a "different voice"—a voice grounded in a "standard of relationship, an ethic of nurturance, responsibility, and care."⁴² According to Gilligan, this standard of responsibility manifests itself in a different moral imperative for women.⁴³ In the final analysis, she defines the masculine voice as a rights-based ethic of justice and the feminine as a relational-oriented ethic of caring. In a sense, Gilligan's work reflects a "separate but equal" idea; she has not so much advocated changing or adapting what she labels the "feminine," as she has a greater appreciation of its value in our society.

While the relational/cultural feminist analysis inspired by Gilligan's work has lent itself more easily to many of the family, workplace, and discrimination issues, it has provided little insight about other issues including sexual violence against women. And, while it might have been considered prescriptive with regard to those issues where it found direct application, the prescription was usually that women could, and perhaps should, find happiness and satis-

39. See, e.g., Bartlett, *Feminist Legal Methods*, *supra* note 10; Wishik, *To Question Everything*, *supra* note 3.

40. See, e.g., NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING* (1978); DOROTHY DINNERSTEIN, *THE ROCKING OF THE CRADLE* (1978); GILLIGAN, *DIFFERENT VOICE*, *supra* note 26.

41. See GILLIGAN, *DIFFERENT VOICE*, *supra* note 26, at 18-22, 25-40 (referring to Lawrence Kohlberg's 1958, 1973 and 1981 studies, which had determined girls inferior to boys in regard to the development of their capacity for moral reasoning and decision-making).

42. GILLIGAN, *DIFFERENT VOICE*, *supra* note 26, at 159-60.

43. GILLIGAN, *DIFFERENT VOICE*, *supra* note 26, at 100.

faction in their present nurturing roles and, essentially, that they should celebrate their difference, their own accomplishments, and be content.⁴⁴ Society, in turn, should attribute greater value to these characteristics and roles.

Others adopted Gilligan's view of gender difference and began to utilize this "feminine" motif as critique of the dominant ideology. A significant corpus of literature affirming and applying her theory proliferated in the 1980s, with her masculine-feminine dichotomy⁴⁵ finding application in numerous legal contexts. These have included legal education⁴⁶ and practice,⁴⁷ children's rights,⁴⁸ employment discrimination,⁴⁹ sexual harassment,⁵⁰ mediation,⁵¹ legal reasoning,⁵² and even corporate,⁵³ tort,⁵⁴ and contract law⁵⁵ doctrines.

44. For an excellent critique of Gilligan, see Joan Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989); see also Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1565-72 (1991) [hereinafter Williams, *Selfless Women*] (discussing Gilligan's description of selflessness, which is valorized in women).

45. I use "masculine-feminine" here to indicate socialized gender, although Gilligan's work actually seems to border on biological determinism, which would be more accurately reflected in "male-female dichotomy."

46. See Christine M. Wiseman, *The Legal Education of Women: From "Treason Against Nature" to Sounding a "Different Voice,"* 74 MARQ. L. REV. 325 (1991); DuBois et al., *Feminist Discourse, A Conversation*, supra note 14, at 49-57.

47. Menkel-Meadow, *Portia in a Different Voice*, supra note 26; Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29 (1987); see also Lucie White, *Paradox, Piece-Work, and Patience*, 43 HASTINGS L. J. 853 (1992).

48. Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1, 15 (1986).

49. Paul Spiegelman, *Court-Ordered Hiring Quotas after Stotts: A Narrative on the Role of the Moralities of the Web and the Ladder in Employment Discrimination Doctrine*, 20 HARV. C.R.-C.L. L. REV. 339 (1985).

50. See, e.g., Note, *The Reasonable Woman Standard: Preventing Sexual Harassment in the Workplace*, 18 WM. MITCHELL L. REV. 795 (1992) (discussing the "reasonable woman" standard in sexual harassment law and men's and women's differing perceptions of situations).

51. Janet Rifkin, *Mediation from a Feminist Perspective: Promise and Problems*, 2 LAW & INEQ. J. 21 (1984).

52. Finley, *Gendered Nature of Legal Reasoning*, supra note 16, at 886.

53. Kathleen A. Lahey & Sarah W. Salter, *Corporate Law in Legal Theory and Legal Scholarship: From Classicism to Feminism*, 23 OSGOODE HALL L.J. 543 (1985).

54. Lucinda Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J. L. & FEMINISM 41 (1989).

55. See Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Patricia A. Tidwell & Peter Linzer, *The Flesh-Colored Band Aid—Contracts, Feminism, Dialogue, and Norms*, 28 HOUS. L. REV. 791 (1991).

Gilligan's starting point is with where women are, and she does not specifically address how they got there. Her discussion of female children's development of an identity that is continuous with their mothers', as primary caretaker, however, comes very close to endorsing biological determinism as the genesis of this different voice.⁵⁶

Others have gone a clear step beyond Gilligan, explicitly drawing the connection between the caring ethic or sense of connectedness that women experience and their biological sex. Probably the most influential of these recently has been Robin West, whose "connection thesis" holds that "women [but not men] are [actually or potentially materially] connected to other human life."⁵⁷ West bases her thesis on four points at which, she asserts, women experience actual or potential connection but men do not: pregnancy, nursing, heterosexual intercourse, and menstruation.⁵⁸ From this connection, according to West, women's defferent voice develops.

In Gilligan's favor, I acknowledge that she articulated an appealing—and for many women historically affirming—challenge to male norms. Joan Williams has written that Gilligan's work should be understood as simply a status report on female gender ideology,⁵⁹ but others have been highly critical of Gilligan's work. Catharine MacKinnon is among these critics, noting Gilligan's failure to explain *why* women develop this different voice. MacKinnon also fears women will identify with Gilligan's positively valued feminine stereotype not because it is the "real" her, but because society has attributed it to her.⁶⁰ As another commentator put it, what cultural and other branches of "difference" feminism celebrate as women's culture concurrently "encourages women to 'choose' economic marginalization and celebrate that choice as a badge of virtue."⁶¹

56. GILLIGAN, *DIFFERENT VOICE*, *supra* note 26, at 151-74.

57. West, *Jurisprudence and Gender*, *supra* note 12, at 18.

58. West, *Jurisprudence and Gender*, *supra* note 12, at 2-3. West prefers the label "material explanation," rather than biological determinism, for her connection thesis. West, *Jurisprudence and Gender*, *supra* note 12, at 21 (noting that some French cultural feminists support her thesis). She explains the general American feminist rejection of material explanations on several grounds: (1) material explanations require willingness to engage in speculative inquiry, a willingness to consider phenomenological explanations, which academics tend to lack; (2) for strategic reasons, as American feminists have realized that most disadvantages imposed on women in the work-force and elsewhere derive from the central reality of women's pregnancy potential. West, *Jurisprudence and Gender*, *supra* note 12, at 21-22.

59. Williams, *Selfless Women*, *supra* note 44, at 1565-66.

60. See DuBois *et al.*, *Feminist Discourse, A Conversation*, *supra* note 14, at 74-75.

61. Williams, *Deconstructing Gender*, *supra* note 19, at 801.

These latter comments and others similar to them have been rebutted, to a certain degree, by Carol Smart, another non-lawyer, who notes that “[a]ll ‘knowledge’ can be put to reactionary use and Gilligan’s work does not carry a special responsibility in this respect.”⁶² Smart sees value in Gilligan’s identification of an “hierarchy of moral reasoning” as well as in her recognition of “subjugated modes” that may be used to challenge the existing dominant ideology.⁶³ Whatever the merits or empirical sustainability of Gilligan’s study,⁶⁴ the feminine voice she portrays is significant for the normative value that relational feminists have ascribed to it. Feminists have been attracted by its contextualized reasoning and personalized fact-finding, believing that these promote greater tolerance for diversity and greater respect for the “perspectives of the powerless.”⁶⁵

Smart has recognized that the qualities and characteristics that are labeled as “male” or “masculine” by Gilligan have elsewhere been described as “Western, imperialist, or ‘white’ thinking.”⁶⁶ Similarly, Joan Williams has argued Gilligan’s appropriation of the critique of “possessive individualism” as well as of the critique of traditional Western epistemology.⁶⁷ Finally, Martha Minow has identified the parallel between male and Western cultural perceptions of knowledge.⁶⁸

What, then, should be made of Gilligan’s seemingly excessive generalizations about women’s characteristics and traits? Not only did she fail to acknowledge differences that may exist across race, class, sexuality, and ethnicity bases,⁶⁹ but as MacKinnon and others have noted, she failed to address the economic, cultural, and social

62. Smart, *Feminist Jurisprudence*, *supra* note 1, at 14.

63. Smart, *Feminist Jurisprudence*, *supra* note 1, at 14.

64. A number of studies have shown results contrary to Gilligan’s, and several scholars in her own discipline, developmental psychology, have criticized her method and conclusions. See Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 625 (1990) (citing RHODE, JUSTICE AND GENDER, *supra* note 18, at 311-12); see also Broughton, *Women’s Rationality and Men’s Virtues: A Critique of Gender Dualism in Gilligan’s Theory of Moral Development*, 50 SOC. RES. 597 (1983) (arguing Gilligan’s exaggeration of the masculine-feminine duality in moral development).

65. Bartlett, *Feminist Legal Methods*, *supra* note 10, at 849.

66. Bartlett, *Feminist Legal Methods*, *supra* note 10, at 849 (citing SANDRA HARDING, THE SCIENCE QUESTION IN FEMINISM (1986)).

67. Williams, *Deconstructing Gender*, *supra* note 19, at 799-800, 806-09.

68. See Martha Minow, *Beyond Universality*, U. CHI. LEGAL F. 115, 131 (1989).

69. Apparently, she subsequently conducted a similar study with factors such as race and class constituting the variables. See DuBois et al., *Feminist Discourse, A Conversation*, *supra* note 14, at 76.

factors that have created the different voice. Perhaps the most productive response to Gilligan's work is to recognize it for what she intended it to be: an empirical study documenting the fact that women may use different criteria and modes of reasoning to make moral decisions than do men, but that this does not necessarily make women inferior to men in any way. It is only when Gilligan's work is projected into a restricting theory that assigns to the "feminine" certain characteristics and to the "masculine" certain other characteristics that it reinforces potentially unhealthy stereotypes for both gender categories. Even if one assumes that the caring ethic has traditionally been women's forte, nothing guarantees that it will or should continue to be. The use to which some legal scholars have put Gilligan's theories in the name of feminism may have accurately claimed a limited historical basis. While a critique of law that stems from a relational and caring orientation is valid, continuing to equate that critique with the "feminine" is not only increasingly outdated, it is also an imprudent and restrictive course for those concerned with improving the lot of women.

IV. RADICAL FEMINISM

One of the primary distinctions between radical feminists and relational feminists is that the former are more aware of power disparities between the sexes. In fact, radical feminists generally articulate their theories in terms of gendered hierarchies of power and dominance⁷⁰ or gender disadvantage,⁷¹ consistently eschewing any pure sameness-difference discussion as unproductive. As Deborah Rhode has suggested, "[t]he critical issue should not be difference, but the difference difference makes."⁷² While some writers within the radical feminist school are more obviously radical (in the typical sense of the word) than others, the movement itself is radical in the sense that it consistently rejects the orthodoxy of traditional jurisprudence on all levels and also because its stance is more overtly political.⁷³

70. See generally MACKINNON, *FEMINIST STATE*, *supra* note 27, at 126-54; MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 27, at 32-45; see also CAROLE PATEMAN, *THE SEXUAL CONTRACT*, ch. 1 (1988) (similarly espousing a grand theory based on sexuality; down-playing the differences between women as less significant than the fact they are *women*).

71. See RHODE, *JUSTICE AND GENDER*, *supra* note 18, at 111, 319.

72. RHODE, *JUSTICE AND GENDER*, *supra* note 18, at 313.

73. Perhaps this is because radical feminism within jurisprudence/law is grounded in the writings and theories of the 1960s and 1970s radical feminists outside law. See, e.g., SHULAMITH FIRESTONE, *THE DIALECTIC OF SEX* (1970); KATE MILLETT,

Catharine MacKinnon, radical feminism's best-known proponent, has called radical feminism the only true feminism—feminism unmodified.⁷⁴ MacKinnon constructs a grand theory, or meta-narrative, that identifies sex as the core of women's oppression and of men's power. In her early classic statement analogizing marxism to feminism, MacKinnon opined that "[s]exuality is to feminism what work is to marxism: that which is most one's own, yet most taken away."⁷⁵ As for the relation of biological sex to socialized gender, MacKinnon sees the former as primary. Gender is essentially the social construction of sexuality.⁷⁶

Although MacKinnon advocates consciousness raising⁷⁷ as the appropriate method by which women can grasp the "reality of women's condition from within the perspective of that experience, not from outside it,"⁷⁸ she assumes the collective—that is, that all women have shared the same basic experience. Unlike many other feminists,

SEXUAL POLITICS (1970). Such radical work, mostly outside the legal discipline, has been carried on in the 1980s by writers such as Andrea Dworkin. See, e.g., ANDREA DWORKIN, LETTERS FROM A WAR ZONE: WRITINGS 1976-1987 (1988); ANDREA DWORKIN, INTERCOURSE (1987). See generally RADICAL VOICES (Renate Klein & Deborah Steinberg eds., 1989); HESTER EISENSTEIN, CONTEMPORARY FEMINIST THOUGHT (1984); POWERS OF DESIRE: THE POLITICS OF SEXUALITY (Ann Snitow, et al. eds., 1983); TAKE BACK THE NIGHT (Laura Lederer ed., 1980).

Although she was almost certainly not the first to posit such, Kate Millett wrote in 1970 that "a disinterested examination of our system of sexual relationship must point out that the situation between the sexes now, and throughout history, is . . . a relationship of *dominance and subordination*." KATE MILLETT, SEXUAL POLITICS 24-25 (1970) (emphasis added).

74. See MACKINNON, FEMINIST STATE, *supra* note 27, at 117; MACKINNON, FEMINISM UNMODIFIED, *supra* note 27, at 15-16.

75. Catharine MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515, 515 (1982) [hereinafter MacKinnon, *Agenda for Theory*]. This was subsequently modified somewhat, with the following analogy in MacKinnon's 1989 book:

As work is to marxism, sexuality to feminism is socially constructed yet constructing, universal as activity yet historically specific, jointly comprised of matter and mind. As the organized expropriation of the work of some for the benefit of others defines a class, workers, the organized expropriation of the sexuality of some for the use of others defines the sex, woman.

MACKINNON, FEMINIST STATE, *supra* note 27, at 3.

76. MACKINNON, FEMINIST STATE, *supra* note 27, at 111, 113.

77. Consciousness raising has elsewhere been defined as "seeking insights and enhanced perspectives through collaborative or interactive engagements with others based upon personal experience and narrative . . ." Bartlett, *Feminist Legal Methods*, *supra* note 10, at 831.

78. MACKINNON, FEMINIST STATE, *supra* note 27, at 121; see also MacKinnon, *Agenda for Theory*, *supra* note 75, at 543.

MacKinnon, in her search for a comprehensive explanation for women's oppression, risks articulating a false consciousness. She maintains that those who disagree with her identification of sex as the situs of oppression do not know "Truth" because they have been unable to discover it within patriarchal society.⁷⁹ Accordingly, although she purports to recognize the significance of other factors, such as race, class and ethnicity,⁸⁰ her analysis subordinates these factors, as they are trumped by her sex-based theory of gender oppression.

MacKinnon argues that law's purported objectivity is male.⁸¹ Furthermore, she asserts, "[O]bjectivity is the methodological stance of which objectification is the social process."⁸² In turn, sexual objectification subordinates women. MacKinnon's theory is most easily and directly applicable in legal contexts such as obscenity, rape, and reproductive freedom.⁸³ However, in presenting her work as a meta-narrative, MacKinnon also suggests its role in explaining women's inequality in any and all contexts. She explains the big picture thus:

Inequality because of sex defines and situates women *as women*. If the sexes were equal, women would not be sexually subjected. Sexual force would be exceptional, consent to sex could be commonly real, and sexually violated women would be believed. If the sexes were equal, women would not be economically subjected, their desperation and marginality cultivated, their enforced dependency exploited sexually or economically. Women would have speech, privacy, authority, respect and more resources than they have now.⁸⁴

Finally, she asserts that women's equality to men will not be scientifically provable until such proof is no longer necessary.⁸⁵

Beyond the initial step of identifying inequality as a matter of dominance and subordination, rather than of sameness and difference, MacKinnon advocates constant mindfulness of this reality so that it

79. See MACKINNON, *FEMINIST STATE*, *supra* note 27, at 115-17.

80. MACKINNON, *FEMINIST STATE*, *supra* note 27, at 47-59.

81. Furthermore, she defines "male" as "a social and political concept, not a biological attribute, having nothing whatever to do with inherency, preexistence, nature, essence, inevitability, or body as such." MACKINNON, *FEMINIST STATE*, *supra* note 27, at 114.

82. MACKINNON, *FEMINIST STATE*, *supra* note 27, at 124.

83. See generally MACKINNON, *FEMINIST STATE*, *supra* note 27, at 171-83, 195-214.

84. MACKINNON, *FEMINIST STATE*, *supra* note 27, at 215 (emphasis added).

85. MACKINNON, *FEMINIST STATE*, *supra* note 27, at 117.

may eventually be translated into new doctrinal and jurisprudential concepts may be achieved.⁸⁶ Once women's concrete reality has been declared, MacKinnon says the next step must be to recognize male forms of power as they are embodied in legal rights for individuals. This would apply differently in various legal contexts, but the ultimate goal would be to "qualify or eliminate . . . powers of men . . . [to] use, access, possess, and traffic women and children."⁸⁷

MacKinnon's acknowledgement that advancement for women plays out differently in different contexts is similar to the agenda for research and change of another "disadvantage" feminist, Deborah Rhode. Rhode tends to speak in more moderate terms than does MacKinnon,⁸⁸ and she does not embrace MacKinnon's grand theory. Indeed, she eschews such products, calling for "theory without Theory . . . fewer universal frameworks and more contextual analysis."⁸⁹ On the related matter of women's experience, Rhode also departs from MacKinnon in that she recognizes a greater variety of women's lived realities.⁹⁰

Like MacKinnon, however, Rhode rejects the sameness-difference analysis, opting instead for a realistic assessment of how women's differences may be used against them in legal analysis. Her agenda for reform resembles MacKinnon's in the sense that she encourages going beyond declarations of women's equality to look at strategies for securing women's treatment as equals.⁹¹ "[A]nalysis should turn on whether legal recognition of gender distinctions is likely to reduce or reinforce gender disparities in power, status, and economic security."⁹²

V. THE PUBLIC-PRIVATE DICHOTOMY

Some commentators have found it useful to analyze the law's relation to women in terms of the public and private spheres of life.

86. MACKINNON, *FEMINIST STATE*, *supra* note 27, at 243.

87. MACKINNON, *FEMINIST STATE*, *supra* note 27, at 245.

88. *See generally* RHODE, *JUSTICE AND GENDER*, *supra* note 18.

89. RHODE, *JUSTICE AND GENDER*, *supra* note 18, at 316; *see also* Rhode, *Critical Theories*, *supra* note 6, at 619.

90. RHODE, *JUSTICE AND GENDER*, *supra* note 18, at 318; Patterson, *Postmodernism/Feminism*, *supra* note 10; Rhode, *Critical Theories*, *supra* note 6, at 621-23; *see generally* ZILLAH EISENSTEIN, *THE FEMALE BODY AND THE LAW* (1988); MARTHA MINOW, *MAKING ALL THE DIFFERENCE* (1990).

91. RHODE, *JUSTICE AND GENDER*, *supra* note 18, at 319.

92. Rhode, *Critical Theories*, *supra* note 6, at 625; *compare* MACKINNON, *FEMINIST STATE*, *supra* note 27.

Katherine O'Donovan, a leading exponent of this analysis, uses "public" and "private" to refer to distinctions between the aspects of life that are regulated by law and those that are not.⁹³ While observing that the boundary between these spheres shifts over time, she argues that the presence of the distinction is significant because it long has been imbued in legal philosophy and informed legal policy.⁹⁴ O'Donovan speculates that the distinction between the two, while not totally static, is unlikely to collapse completely. Nevertheless, she advocates a union of the two spheres, visualizing such a synthesis as a move that would free both men and women from having to choose between them.⁹⁵

Others have taken a different tack arguing that the public-private dichotomy is best seen as reflective of the family-market split and is perfectly synonymous with neither the male-female nor the state-society dichotomies, even though there is significant overlap among them in Western culture.⁹⁶ Accordingly, even if male-female analysis were no longer associated with the market-family dichotomy, the latter would continue to exist. This is very troubling for those feminist legal scholars who object to all dichotomous thinking and who would rather see these categories transcended. These writers, like O'Donovan, advocate greater market-family and public-private interrelation, noting that the structure of each part of the current dichotomy exacerbates the conflict between them, revealing a paradox of sorts when attempts are made to resolve that conflict.⁹⁷ Nancy Dowd reveals that paradox, stating that "[r]esolution [of the conflict] depends upon attacking the socially and culturally constructed gender roles that infuse the highly gendered work-family structure. Confronting gender issues is essential But it is not enough."⁹⁸

Dowd advocates elimination of the division of work and family responsibilities on the basis of sex, but she recognizes that the social and cultural constructs of employment and parenting roles that rest upon the gender division would not necessarily change the relation

93. O'DONOVAN, *supra* note 28, at 3 (acknowledging and discussing other legal definitions of public and private).

94. O'DONOVAN, *supra* note 28, at 8.

95. O'DONOVAN, *supra* note 28, at 180; *see also* Williams, *Selfless Women*, *supra* note 44, at 1565 n.22.

96. *See* Dowd, *Work and Family*, *supra* note 28, at 111-12, 118-19; Olsen, *Family and Market*, *supra* note 28, at 1499.

97. *See* Dowd, *Work and Family*, *supra* note 28, at 110-12; Olsen, *Family and Market*, *supra* note 28, at 1578; *see also* PATEMAN, *supra* note 28, at 10-13.

98. Dowd, *Work and Family*, *supra* note 28, at 111.

between work and family. Nor would they necessarily alter the content of parenting or employment roles. This is because, as Dowd notes, workplace structure is not solely a consequence of gender but also reflects hierarchies of class and race, the economic and organizational consequences of a post-industrialist advanced capitalist system, and fundamental concepts of the individual, family and community, and their interrelationship with respect to children. Dowd wisely observes that if we stop at gender, we will merely reconstruct gender and reallocate roles, rather than questioning the content of the roles and the structure within which they operate.⁹⁹ Dowd concludes that society should prioritize neither work nor family, public nor private, but rather should work to restructure the relation between the two.¹⁰⁰

So, while gender is a primary determinant, it is not the sole determinant of the existing public-private dichotomy within law. Beyond that, however, because the public-private division in law is not strictly a gender issue, an adequate solution to the problems facing women requires that additional issues be addressed in each of these spheres, and that leaves us not far beyond the starting point. Still, the public-private doctrine is useful at the point where some theorists conclude that the distinction between the two spheres should be obliterated so that strategies capable of empowering women and of transforming the domestic and public lives of both women and men can be formulated and, eventually, render these concepts unrepresentative or, ultimately, redundant.¹⁰¹

VI. STANDPOINT/POSITIONAL EPISTEMOLOGY

Several of the methodologies previously discussed have touched upon epistemological issues, implicitly or explicitly expressing doubt about the purported objectivity of traditional jurisprudence. This is reflected in the style of consciousness raising advocated by MacKinnon,¹⁰² as well as in Gilligan's thesis that men and women view

99. Dowd, *Work and Family*, *supra* note 28, at 111-12.

100. Dowd, *Work and Family*, *supra* note 28, at 111-12.

101. See Morgan, *supra* note 3, at 751 (discussing Olsen, *Family and Market*, *supra* note 28, at 1566-67); Dowd, *Work and Family*, *supra* note 28, at 99-100, 110-12, 171-72.

102. As Catharine MacKinnon has written about the importance of epistemology in her search for a feminist theory of the state,

Epistemology and politics emerged as two mutually enforcing sides of the same unequal coin. A theory of the state which was at once social and discrete, conceptual and applied, became possible as the state was seen to participate in the sexual politics of male dominance by enforcing its epistemology through law.

MACKINNON, *FEMINIST STATE*, *supra* note 27, at xi. See *supra* notes 82-87 and accompanying text.

the world around them differently. Not all scholars have relegated epistemology to a secondary issue. Some have focused almost exclusively upon the matter of how knowledge is acquired within legal frameworks and upon the import of this issue when admittedly seeking to compel the law's responsiveness to women's needs and problems.

Generally speaking, a feminist epistemology is pro-experience and anti-abstraction; it embraces subjectivity while rejecting dominant ideology's claims to objectivity and universality. Among those feminist legal scholars who have taken up the epistemological torch are Kathleen Lahey, who also embraces consciousness raising as a means of producing feminist theory.¹⁰³ Lahey has stated that feminist scholarship is about "who may speak for other people and how the appropriation of experience can be legitimated in the process of constructing knowledge."¹⁰⁴ She sees consciousness raising as a way in which women can generate "moments-of-'knowing' " when the unconscious structures of the mind are exposed to conscious structures.¹⁰⁵ However, Lahey sees the process as an ongoing struggle, not one capable of producing a "static state of precisely describable and perfectly communicable knowledge."¹⁰⁶ She advocates an open-ended agenda, developed on a small scale with constant referral to women's actual experiences. Lahey acknowledges the ambiguities and uncertainties that characterize the project, but still prefers a modest scale to MacKinnon's "Grand Theory" approach, which, at some stage, risks abandonment of women's lived experience and opts for abstraction.¹⁰⁷

Others, in the MacKinnon mold, have been more dogmatic about their belief in consciousness raising as *the* method of feminism. These writers have claimed consciousness raising as the badge that lends validity to feminism because it allows women to take their personal experiences to a political level.¹⁰⁸

Ann Scales has also championed consciousness raising, though her expectations of it are less ambitious. She has taken up the issue of legal objectivity and the role that it plays in denying the reality of women's experience. Similar to MacKinnon, Scales sees objectivity

103. Lahey, *Until Women Themselves*, *supra* note 2, at 532.

104. Lahey, *Until Women Themselves*, *supra* note 2, at 525.

105. Lahey, *Until Women Themselves*, *supra* note 2, at 532.

106. Lahey, *Until Women Themselves*, *supra* note 2, at 533.

107. Lahey, *Until Women Themselves*, *supra* note 2, at 536.

108. *See, e.g.*, Wishik, *To Question Everything*, *supra* note 3, at 69 (hence the feminist "motto" that "the personal is political").

as a methodological stance that is conducive to objectification of women. Also tracking MacKinnon, Scales advocates consciousness-raising as methodology, insisting that experience is the most accurate expression of truth and that it can provide law with "dramatic eye-witness testimony."¹⁰⁹ However, it is on Gilligan's theories that Scales builds when she argues that objectification is part of the masculine consciousness. As a psychological phenomenon, it is therefore more powerful than mere objectivity in the cultural sense because it celebrates the masculine existence and consciousness.¹¹⁰ Still, Scales does not equate the rejection of objectivity with the rejection of standards and "truths." In order to discern appropriate standards and truths, she advocates continuous evaluation of results and continuous self-critique of feminist jurisprudence, along with the current critique of traditional jurisprudence. She rejects *a priori* abstract concepts that prevail regardless of actual results.

Scales' result-orientation, however, lulls her into a familiar feminist pitfall: the failure to account for heterogeneity of women. Her theory presumes that certain "truths" are obtainable and that feminists can reach consensus about what a good standard or "truth" is.

Katharine Bartlett has articulated an interesting modification of the sort of "standpoint epistemology" represented by consciousness-raising.¹¹¹ She advocates a method, which she calls positionality, that admits its point of view but is not static and does not state gender as the essential category of analysis. Bartlett's positionality concept retains some of the knowledge-based-upon-experience approach. It rejects, however, the dominant view of truth as external and objective, opting instead for a "situated and partial" view of truth that emerges from one's involvements and relationships.¹¹² We must seek to expand our limited perspectives as individuals and to expand sources of identity so that we avoid imposition of our (feminism's) point of view upon the world and avoid making gender analysis essential. Bartlett believes that from the critical process, certain increasingly final and fixed truths will emerge. We must, however, be cautious not to try to identify too many "truths," not to be too lax in our criticism of the substance of such "truths," and not to defend them too dogmatically.¹¹³

109. Ann C. Scales, *Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L. J. 1373, 1402 (1986).

110. *Id.* at 1380-84.

111. See generally Bartlett, *Feminist Legal Methods*, *supra* note 10.

112. Bartlett, *Feminist Legal Methods*, *supra* note 10, at 880.

113. Bartlett, *Feminist Legal Methods*, *supra* note 10, at 883-84.

She summarizes the method:

Positionality is a stance from which a number of apparently inconsistent feminist "truths" make sense. The positional stance acknowledges the existence of empirical truths, values and knowledge, and also their contingency. It thereby provides a basis for feminist commitment and political action, but views these commitments as provisional and subject to further critical evaluation and revision.¹¹⁴

Bartlett seems to be trying to overcome one of the recurring paradoxes of feminist jurisprudence and methodology: The conflict between an epistemology that seeks to accommodate, validate, and affirm every *individual* woman's experience while also seeking some *common* ground—some common "truths"—upon which to construct a new jurisprudence that accounts for their experience(s). She evidently believes that a positional methodology can reconcile the apparent contradiction between the value in recognizing diversity and the need to attempt a transcension of that diversity.¹¹⁵ In this sense, I believe Bartlett's work signals a more mature feminist jurisprudence. Gone are the essentialism, dogmatism, and absolutism of some earlier works, perhaps to be replaced by a method that recognizes the importance of gender, while also acknowledging that its significance may vary from one legal context to another and also may shift over time and from one legal system to another. The test of Bartlett's methodology may now be whether law as a discipline is capable of sufficient flexibility and responsiveness to appreciate and integrate such complex and transient viewpoints.

VII. REALISM, SOCIETY AND LAW

The proponent of a different methodology, which she has labeled "women's law," is Norwegian lawyer and academician, Tove Stang Dahl.¹¹⁶ Although her analysis is not generated from the context of law or the state and does not address issues of power, Stang Dahl speaks in terms of a women's justice that will evolve, eventually permeating law at the levels where she perceives law operating in women's lives—primarily in the administrative and regulatory spheres. She argues that the way to modify the existing law is to focus upon

114. Bartlett, *Feminist Legal Methods*, *supra* note 10, at 880.

115. See Bartlett, *Feminist Legal Methods*, *supra* note 10, at 885.

116. See generally DAHL, *WOMEN'S LAW*, *supra* note 30; Dahl, *Taking Women as a Starting Point*, *supra* note 30.

legislation and legal practice, bringing to bear methods of social science in their formulation.¹¹⁷

This approach to feminist jurisprudence, like the method of consciousness-raising discussed above, is realist in methodology and nature, presuming that the basis of the critique must be women's lived experience. However, unlike those frameworks for analysis focused on consciousness-raising as a means of formulating a feminist agenda, this approach commences at the point where women are not necessarily where feminists are. It is content with women's consciousness. From this starting point, Stang Dahl argues that women's concerns and needs should inform the development of new areas of law or at least the reclassification of existing categories, including birth law, paid-work law, housewives' law, and money law.¹¹⁸ Stang Dahl assumes the existence of a consensus that supports her moral stance, one that focuses upon freedom, equality, dignity, integrity, self-determination, and self-realization for women.¹¹⁹

Stang Dahl only cursorily addresses the meaning of such terms as "women" and "experience," seeming thereby to ignore their complexity. She assumes that some unifying women's experience can be discovered and that "women" is a concrete, knowable category. Implicitly, then, she ignores the heterogeneity of the group.

Stang Dahl offers no apology for the presence of women-centered policy considerations at the heart of women's law. In fact, she recognizes the value of exchange between the feminist political stance and women's studies as a science, as the former informs the direction of the latter. Unlike most other feminist jurisprudential thinkers, however, she expresses faith in a true distinction between the two, stating that science's primary mission is to seek knowledge and understanding, which in turn influences the women's polemic.

VIII. SOCIAL INJURY/HARM APPROACH

Several feminist legal writers—including MacKinnon,¹²⁰ Wishik,¹²¹

117. Dahl, *Taking Women as a Starting Point*, *supra* note 30, at 240-41.

118. Dahl, *Taking Women as a Starting Point*, *supra* note 30, at 242.

119. Dahl, *Taking Women as a Starting Point*, *supra* note 30, at 244-45.

120. See MACKINNON, *FEMINIST STATE*, *supra* note 27, at 195-214 (in pornography context).

121. See generally Wishik, *To Question Everything*, *supra* note 3.

West,¹²² and Matsuda¹²³—have touched on or utilized the social injury or harm approach in their work. Working to some extent within orthodox legal concepts, this method still challenges the primacy of legal liberalism's rights-based analysis, shifting the emphasis to social injury or harms which may occur when some members of society exercise their "rights." One example of this analysis may be seen in MacKinnon's work on sexual harassment, activity that is now recognized as a harm within the U.S. civil rights laws.¹²⁴ This strategy is increasingly applied in the context of free speech, as women and other groups seek to establish and have legally recognized the harm that may be caused to women when someone exercises his or her constitutional right to free speech.¹²⁵

Professor Adrian Howe has also focused on the social injury approach, articulating a theory of social injury originating in that concept's use in criminology; but Howe has excised the theory from that context and developed it into one that illustrates its relevance to women.¹²⁶ Howe suggests an analytical privilege for the "concept of social injury—in particular, the concept of gender-specific injury—within feminist legal theory and, ultimately, legal discourse."¹²⁷ As Howe notes, once we have decided that the law is an appropriate arena for change, we need to speak in legally cognizable, legally

122. West has argued that the law generally recognizes harms to women only when they are analogous to harms which deprive a right that is comprehensible to masculine liberal jurisprudence. See West, *Jurisprudence and Gender*, *supra* note 12, at 58-59.

123. See Matsuda, *Considering the Victim's Story*, *supra* note 31; Mari Matsuda, *Language as Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation*, 37 BUFF. L. REV. 337 (1988) [hereinafter Matsuda, *Language as Violence*].

124. See generally MACKINNON, FEMINISM UNMODIFIED, *supra* note 27, at 103-16.

Mark Kelman, a well-known scholar within the American Critical Legal Studies movement, has commented upon the harm concept in this context.

A woman may ultimately be just as abused and exploited by the sexual harasser as the rapist; the fact that the sexual harasser so closely resembles the boss in his ordinary mode . . . should ultimately be used by radicals to undermine the legitimacy of power, not to defend harassers as obviously noncriminal.

Mark Kelman, *Criminal Law: The Origins of Crime and Criminal Violence*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys ed., 1982).

125. See generally CATHARINE MACKINNON, ONLY WORDS (1993); see also MACKINNON, FEMINISM UNMODIFIED, *supra* note 27, at 127-213 (discussing harm in context of pornography); Matsuda, *Considering the Victim's Story*, *supra* note 31 (extremist/sexist speech context); Matsuda, *Language as Violence*, *supra* note 123 (group defamation context).

126. Howe, 'Social Injury' Revisited, *supra* note 3.

127. Howe, 'Social Injury' Revisited, *supra* note 3, at 432.

actionable terms.¹²⁸ Howe advocates the identification and politicization of "hidden injuries" that occur in our gender-ordered society¹²⁹ and concludes that redress for such gender-specific injuries must be provided in any valid jurisprudence of social justice.¹³⁰

While Howe's work is helpful and pragmatic in its utilization of traditional legal concepts, this may also be one of its disadvantages. Howe's theory may go only part of the way in the feminist jurisprudence attempt to improve women's situation within law and by means of law. This is because identifying a social injury is not the same as establishing a legally cognizable one. Just because a harm is identified does not guarantee legal recognition of its causal link to the objectionable activities that feminists believe should be restricted or prohibited.¹³¹ Furthermore, unless the law deems a harm or injury sufficiently serious, it is highly unlikely that exercise of the "right" from which the harm results will be circumscribed by law. *Man-made* law has typically attributed little import to women-specific harms, and unless a radical overhaul occurs in the judiciary and legislatures, this is unlikely to change.

Feminist work with the social-injury construct may, then, be useful with regard to some issues and at some stages of the project. As a strictly legal construct,¹³² however, its usefulness is almost certainly limited.

IX. CONCLUSION

Each of the approaches to feminist jurisprudence discussed above has made valuable contributions to the development of a more sophisticated discipline than perhaps could have been envisioned a decade ago. While many commentators have focused on divisions among various factions of feminists, they often have failed to realize

128. Howe, 'Social Injury' Revisited, *supra* note 3, at 432.

129. Howe, 'Social Injury' Revisited, *supra* note 3, at 433.

130. Howe, 'Social Injury' Revisited, *supra* note 3, at 434.

131. See generally Frederick Schauer, *Mrs. Palsgraf and the First Amendment*, 47 WASH. & LEE L. REV. 161 (1990); Frederick Schauer, *Causation Theory and the Causes of Sexual Violence*, 1987 AM. B. FOUND. RES. J. 737.

132. Some writers, most notably Carol Smart, have long questioned whether the law is the appropriate forum for change and would reject outright Howe's analysis. See Smart, *Feminist Jurisprudence*, *supra* note 1, at 17-18; Smart, *Feminism and Law: Some Problems of Analysis and Strategy*, 14 INT'L J. OF SOC. OF L. 109 (1986); see also Minow, *Law Turning Outward*, 73 TELOS 79 (1986) (contemplating whether "law deserves a privileged place in resolving conflict and ordering society").

how the critique within feminism and feminist "theory" has generated a net positive result. As feminist jurisprudence has matured, new analyses have revealed not only the flaws in traditional jurisprudence, but also the flaws in preceding feminist theories. As a particular new analysis has rendered aspects of a previous one obsolete and revealed its ambiguities and contradictions, feminist jurisprudence has been refined and has thus gained strength as a critique of the dominant ideology.

Several transitions from one analysis to another are illustrative of this regenerative phenomenon. Although the "women and the law" approach with which the movement commenced has been much maligned, its import to the early development of feminist jurisprudence can hardly be overstated. Without this initial step to raise women's visibility and provoke discussion about equality issues, the dead-end of the sameness-difference debate would not have been so quickly exposed. Moreover, absent the frustration evoked by that debate, scholars such as MacKinnon and Rhode may not have developed their dominance/disadvantage theses. Just as a gendered analysis revealed the historical inappropriateness—and imminent obsolescence—of law's public-private dichotomy, recent commentators such as Joan Williams and Katharine Bartlett are foretelling the coming redundancy of a gendered analysis.¹³³ The critiques of minority and lesbian feminists have revealed the danger of establishing gender as the essential situs of oppression, while also illustrating the real need for inclusion.¹³⁴ Similarly, the false-consciousness difficulty with MacKinnon's meta-narrative is exposed by other feminists' recognition of women's heterogeneity and corresponding variety of lived experiences. On the other hand, what would unify women sufficiently to build any theory without MacKinnon's identification of and exposition about the common denominator that sex represents?

Thus, feminist jurisprudence has evolved through a series of

133. See *supra* notes 111-15 and accompanying text (discussing standpoint epistemology and positionality).

134. See generally, e.g., Regina Austin, *Sapphire Bound!*, WISC. WOMEN'S L. REV. 536 (1989); Cain, *Grounding the Theories*, *supra* note 2; Cherise Cox, *Anything Less is Not Feminism: Racial Difference and the W.M.W.M.*, 1 LAW & CRITIQUE 237 (1990); Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Marlee Kline, *Race, Racism, and Feminist Legal Theory*, 12 HARV. WOMEN'S L. J. 115 (1989); Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9 (1989).

transitions, just as it should and will continue to do. A vigilantly self-critical stance should be maintained as the discipline enters its next phase. Feminist jurisprudence should remain the object of efforts to "reappraise, deconstruct, and transform,"¹³⁵ just as it makes traditional jurisprudence the object of its reappraisal, deconstruction, and transformation.

The gender issue is indeed important, and it has been ignored for too long. But, what will be the end result of developing a feminist jurisprudence that takes into account solely this factor? If knowledge from a feminist standpoint obscures or precludes knowledge from a working-class or racial minority standpoint,¹³⁶ how can we whole-heartedly embrace it as the new norm we have sought? Still, "feminists must use presently understandable categories, even while maintaining a critical posture toward their use," the dichotomies they represent,¹³⁷ and the potentiality of a counter-productive essentialism. While it is troubling to offer legal remedies based upon the very categories that have contributed to the harm being redressed, it would be imprudent wholly to reject such categories *now*, when we've come only so far.

Joan Williams has argued that our goal is not necessarily gender-neutrality. Rather, it is to de-institutionalize gender.¹³⁸ For if we advocate gender neutrality (*or* gender difference) across the board, we risk leaving women in a worse position than they previously experienced. Thus, the importance of contextual examination becomes apparent. Within contextual analysis, political and social conditions of place and time are necessary considerations,¹³⁹ for only through looking to the realities of women's lives at a given moment can we determine standards and truths and, in turn, formulate responsive rules. Even if these standards, truths, and rules are admittedly tentative and partial, we may feel some confidence in them as the best solution at that moment.

Perhaps it is the appropriate destiny of feminist jurisprudence to continue to function as critique rather than to form a new normative jurisprudence. As Deborah Rhode has written, "our anal-

135. Bartlett, *Feminist Legal Methods*, *supra* note 10, at 887.

136. See Maureen Cain, *Realism, Feminism, Methodology, and Law*, 14 INT'L J. OF SOC. OF L. 255 (1986).

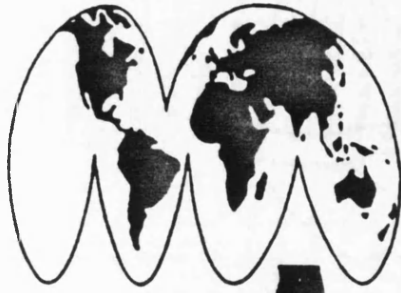
137. Bartlett, *Feminist Legal Methods*, *supra* note 10, at 835.

138. Williams, *Deconstructing Gender*, *supra* note 19, at 836-41 (citing Alison Jagger, *On Sexual Equality*, 84 ETHICS 275, 276 (1975)).

139. See generally Suzanne Gibson, *Continental Drift: The Question of Context in Feminist Jurisprudence*, 1 LAW & CRITIQUE 173 (1990) (discussing the extent to which feminist legal theories may be traded across jurisdictions).

ysis can become more self-critical about the partiality of our understandings and more explicit about the values underlying them."¹⁴⁰ For eventually, when women's views, concerns, and experiences have been recognized by and integrated into mainstream legal philosophy, the notion of a feminist jurisprudence will have been rendered redundant.

140. RHODE, *JUSTICE AND GENDER*, *supra* note 18, at 320.



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PRIVACY JURISPRUDENCE OF THE PRESS COMPLAINTS COMMISSION

By SIR LOUIS BLOM-COOPER, QC and
LISA R. PRUITT

"[W]e commend to the [Press] Council the possibility of a codification of its adjudications on privacy, in a form which would give rather readier guidance to busy practising journalists, and to the interested public, and that it should be kept up to date."

Report of the (Younger) Committee on Privacy 1972.¹

Introduction

Two departmental committees, two decades apart, which focused on the persistent and unresolved problem of reconciling press freedom with press responsibility, particularly as regards invasion of privacy, look like bearing fruit.² Responding to the Fourth Report of the National Heritage Committee, *Privacy and Media Intrusion*³, the Lord Chancellor's Department and the Scottish Office have recently issued a consultation paper, *Infringement of Privacy*⁴ proposing the creation of a civil remedy against whomever infringes an individual's privacy. The consultation paper envisaged a Press Ombudsman established by the press (and hence non-statutory) to deal with complaints from the public about press conduct as a quicker and less formal remedy than court proceedings in privacy cases involving the press. An Ombudsman scheme, which "would probably not be obliged to follow the procedures built up under a new law"⁵ would exist alongside the statutory remedy, as a complement to it. How

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1. Cmnd.5012, para.193 at 55.
 2. Report of the Committee on Privacy and Related Matters, 1990, Cmnd.1102, [hereinafter Calcutt Mark I]. The committee was reviewed subsequently by its chairman, Sir David Calcutt, QC, *Review of Self-Regulation of the Press*, 1993, Cm.2135 [hereinafter Calcutt Mark II].
 3. HC 294-1, March 24, 1993.
 4. July 30, 1993.
 5. *Op. cit.*, para.6.3, p.41.

should the non-statutory remedy develop, having regard to the past experience of the Press Council and its successor body, the Press Complaints Commission?

The call by the Younger Report in 1972 for codification and a developed body of case law fell on deaf ears, until the scare of legislative intervention in 1989⁶ and the report in June 1990 of Calcutt Mark I propelled the newspaper industry to set up the Press Complaints Commission, equipped with an industry-drafted code - including an article on privacy - which the Commission was charged to interpret and apply. In spite of long-standing concerns about invasion of privacy, neither the Press Council's uncodified corpus of decisions over the 37 years of its existence (1953-1990), nor the early attempts of the Press Complaints Commission have adequately addressed the problem. Comprehensive and coherent guidelines about the boundaries of the private arena of individual lives which the press must not invade, by journalistic investigation or editorial publication, have yet to be established. Since a law of privacy, if enacted by Parliament, must be some way off, and any ensuing jurisprudence of the courts are unlikely to emerge before the end of the century, any non-statutory development of the principles applicable to protection of private lives from press intrusion must be welcome.

It was not until 1976 that the Press Council bowed to pressure and issued a declaration of principle regarding privacy.⁷ Even then, the standard articulated was a vague one, and subsequent adjudications did little or nothing to clarify the line over which the press should not step. The perceived failings of the Press Council generally, and in the invasion of privacy context specifically, were undoubtedly a factor that discredited it in the eyes of the public and led to its disbandment and replacement by a new body charged with adjudicating on complaints under

6. The Protection of Privacy Bill was introduced by Mr John Browne, MP for Winchester, in 1988. It passed committee stage but was withdrawn before Report, on the announcement of the setting up of the Calcutt Mark I in April 1989.

7. See *The Press and the People*, 24th Annual Report of the Press Council (1977) pp.109-11 (quoting the Declaration of Principle in its entirety).

a Code of Practice framed exclusively by the industry. The early decisions of the Press Complaints Commission on privacy deserve close attention and evaluation, as a pointer to future development.

It may help the reader of this article to see the relevant article of the Press Industry's Code of Practice on privacy as set alongside the suggested article in both Calcutt Mark I and the proposed code of practice in the report of the National Heritage Committee:

**THE PRESS
INDUSTRY'S CODE
OF PRACTICE**

4. Privacy

Intrusions and inquiries into an individual's private life without his or her consent are not generally acceptable. Publication can only be justified when in the public interest.

This would include:

- (i) Detecting or exposing crime or serious misdemeanour.
- (ii) Detecting or exposing seriously anti-social behaviour.
- (iii) Protecting public health and safety.
- (iv) Preventing the public from being misled by some statement or action of that individual.

**CALCUTT
COMMITTEE'S
PROPOSED CODE
OF PRACTICE**

4. Privacy

(i) Making inquiries about the personal lives of individuals without their consent is not generally acceptable.

(ii) Publishing material about the personal life of individuals without their consent is not generally acceptable.

(iii) An intrusion into an individual's personal life can be justified only for the purpose of detecting or exposing crime, or seriously anti-social conduct, protecting public health or safety, or preventing the public being misled by some public statement or action of that individual.

(iv) An individual's

**THE NATIONAL
HERITAGE
COMMITTEE'S
PROPOSED CODE
OF PRACTICE**

4. Privacy

(i) Making inquiries about the personal lives of individuals without their consent is not generally acceptable.

(ii) Publishing material about the personal life of individuals without their consent is not generally acceptable.

(iii) An intrusion into an individual's personal life can be justified only for the purpose of detecting or exposing crime, protecting health or safety, or preventing a harmful deception of the public.

(iv) An individual's personal life includes matters of health, home personal relationships, correspondence and

personal life includes matters of health, home, personal relationships, correspondence and documents but does not include his trade or business.	documents but does not include his trade or business.
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While relatively few complaints have been brought under clause 4 of the PCC's code, several of the privacy adjudications have been among the highest profile matters yet to be considered by the Commission.⁸ The relative rarity of invasion of privacy adjudications - only a handful of adjudications citing clause 4 were issued in the PCC's first year - makes it difficult to analyse the Commission's privacy jurisprudence in a systematic way. Difficulty in discerning privacy principles from the adjudications is exacerbated by the Commission's failure to draft them with any sense of juridical purpose - that is, to identify essential issues arising from a complaint and then to apply the rule of the relevant Code article to determine the proper result. The difficulty was further compounded by the fact that adjudications were not issued separately but were included in a monthly bulletin, whilst the shortness of the reasoning for decisions was further trouble. A number of other adjudications, some of which are discussed below, could properly be considered as privacy cases, although clause 4 was not cited.

Consider the Clare Short matter. Because the complaint dealt with a number of issues that have arisen in subsequent complaints, it *might* have set precedents to influence or determine the outcomes of those matters.

Ms Short's allegations of invasion of privacy arose from an investigation by a *News of the World* reporter and story

8. The Princess Eugenie and Clare Short adjudications provoked extensive press commentary. See, eg, "Discipline of the Press," (1991) *The Times* (London), August 10, (discussing *The People's* flouting of the PCC ruling in the Princess Eugenie case); "Up and Down the City Road," (1991) *The Independent Magazine*, August 17, p.9 (discussing the Clare Short case); Kate Muir, "Short Story Long on Headlines," (1991) *The Times* (London), February 1, (interviewing Clare Short about her complaint).

subsequently published by that newspaper. Her complaint, enumerating a number of incidents arising from the reporter's activity and the subsequent publication, raised both clause 1 (inaccuracy)⁹ and clause 4 (privacy) issues. In brief, the chronology of events leading to Ms Short's complaint was that, in 1986, she had introduced a bill in Parliament which would have curtailed publication of "page 3 girl" photos, which she considers pornographic.¹⁰ She alleged she was subsequently the object of a "campaign of vilification" by *The Sun* and its sister paper, *The News of the World*. Ms Short complained about two specific incidents where the latter had linked her, in quite a misleading fashion, to pornography. The Commission upheld her complaint in this regard, albeit on unspecified grounds, noting the "inescapable suspicion" that the paper engaged in these objectionable activities with a purpose to embarrass Ms Short in retaliation for her anti-pornography stance.¹¹ It is unclear whether this reprehensible motive carried over, and was relevant to other activities about which Ms Short complained.

In late 1990, Ms Short had received several reports indicating that she was being investigated by a *News of the World* reporter. The reporter had first contacted her former husband, asking him for a photo showing Ms Short topless or in a nightgown. The reporter's knowledge that the former husband was mentally unstable and that he had previously threatened Ms Short was undisputed. Secondly, the reporter had investigated Ms Short's friendship, during the early 1970s, with John Daniel, a man who had been convicted of various criminal offences prior to that friendship. Several years after the end of his relationship with

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9. Accuracy: (i) Newspapers and periodicals should take care not to publish inaccurate, misleading or distorted material; (ii) whenever it is recognized that a significant inaccuracy, misleading statement or distorted report has been published, it should be corrected promptly and with due prominence; (iii) an apology should be published whenever appropriate; (iv) a newspaper or periodical should always report fairly and accurately the outcome of an action for defamation to which it has been a party.
 10. Press release No.91-121/No.11, Press Complaints Commission, May 31, 1991 [hereinafter Short adjudication].
 11. *Id.*, p.3.

Ms Short, Daniel had been the victim of a murder for which no one had ever been charged. Early in 1991, convinced that the *News of the World* was about to publish a story related to these investigations, Ms Short gave a speech in the House of Commons outlining these investigations into her private life and attacking the publication and its staff. The material about which she had spoken was published by the *News of the World* a few days later.

Ms Short's complaint was considered under clauses 1 and 4 of the Code of Practice.¹² The invasion of privacy claims may have related only to the investigation, and the inaccuracy claims may have related only to the publication.¹³ This is logical, given the manner in which Ms Short presented her case. After all, any information that was "private" was first published by her House of Commons speech which attacked the investigative tactics used by the *News of the World* reporter. Accordingly, she would have waived any right to complain of invasion of privacy over its subsequent publication in the newspaper. A complaint that the newspaper report contained inaccuracies and misrepresentations was, however, appropriate.

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12. Whether she expressly identified the inaccuracy and privacy issues, along with the corresponding code sections, is uncertain. It is more likely that the PCC categorized the complaint in this manner. Although in its early adjudications the PCC frequently failed to cite any clause of the code, in later adjudications the Commission has more often referred to a specific clause. The Commission declines to decide complaints in which a *prima facie* breach of the code does not arise. This rule implicitly requires that a code clause be identified for each complaint adjudicated. In practice, however, the Commission often issues adjudications, referring to a vagary it calls the "spirit of the code." The introduction to the code specifically states: "The code applies in the spirit as well as in the letter." While the National Heritage Committee Report echoes this, Calcutt Mark I significantly omits such a vacuous phrase. Is there any reason to treat self-regulation in this respect differently from a quasi-judicial tribunal?
 13. The adjudication expressly states that "Ms Short's complaint is that the article misrepresented her criticism of the [*News of the World*] in Parliament. *Id.*, p.10. However, only a few sentences later it states that, in publishing the story about Ms Short, the newspaper should have "taken special care that it did not use the article as cover for publication of irrelevant facts about Ms Short's private life, which it could not otherwise justify under clause 4." *Id.*, p.11.

One issue on which the Commission correctly focused, as a determinative element of the adjudication, was Ms Short's status as a public figure - at least inasmuch as that brought the matter within the purview of "public interest." As both Ms Short and the *News of the World* accepted, the paper was justified in inquiring into aspects of a public figure's private life on the assumption that information discovered might be in the public interest. Still, the Commission held that such inquiries could not justify publication of the information unless the facts discovered in the course of the investigation satisfied the "public interest" test of clause 4. Commenting on the meaning of "public interest," the Commission stated that it is not merely "whatever happens to interest the public."¹⁴ The adjudication expressly recognized that "circumstances in the private life of [an MP] may bear on her conduct of that office or fitness for it," but it never concluded whether the test was satisfied on the known facts. The Commission simply noted that the *News* had not sought to "suggest that information it possessed ... would have justified an article about her which was in the public interest,"¹⁵ implying that both parties agreed there was none on the facts revealed by the investigation. At no point was any specific part of clause 4's four-prong public interest test discussed, leading us to wonder whether the Commission considered the codified test at all.

Rather than concluding its inquiry with this finding, that "public interest" could not justify publication of the offending statements, the Commission in its adjudication considered several other matters, stating some informative dicta, but also making several comments that served only to obscure the issues on which the decision turned - or at least should have turned. Among its more positive contributions, the Commission noted that passage of time does not necessarily diminish the relevance of justification for publishing material that otherwise meets the "public interest" test.¹⁶ As with many American courts' handling of suits for

14. *Id.*, p.6.

15. *Id.*, p.11.

16. *Id.*, p.6. This is consistent with the dominant rule in the privacy jurisprudence of most American states. Restatement (2d) of Torts, 652D, comment k (1977) [hereinafter Restatement (2d)]. This would also be

publication of private facts, the Commission was also sensitive to the investigative, newsgathering techniques employed by the *News of the World* journalist. The Commission considered the report's knowledge of the former husband's psychiatric condition particularly damning, calling the journalist's behaviour "indefensible."¹⁷ It upheld Ms Short's complaint "in this respect," a statement which is somewhat confusing by its implication that an independent basis for complaint arises from the investigative technique of the journalist. If the Commission considered this activity independently to give rise to a privacy complaint, it should have been explicit about that finding. Generally, under the common law of most American states for example, deceptive or otherwise offensive newsgathering techniques do not independently give rise to a cause of action, unless they rise to the level of "intrusion upon seclusion" - as literally into one's home.¹⁸ The method of obtaining information is relevant as a potentially aggravating factor, but it is not generally the subject of ultimate inquiry.

The Commission appeared to attribute more import to investigative process. This is consistent in some ways with the Calcutt Mark I's recommendation that certain forms of physical intrusion should be criminal offences in England and Wales.¹⁹ Ms Short's physical privacy, however, was not invaded in any of the ways enumerated in Calcutt Mark I's recommendation so it is surprising that the adjudication did not specifically refer to the Calcutt proposal. What the Commission ought to have recognized - and probably sought to in the Clare Short

supported by a May 1992 adjudication of a complaint by Mr David Sullivan in which the Commission upheld the *News of the World's* mention of the complainant's 12-year-old spent conviction for living off immoral earnings by running a massage parlour. See David Sullivan II, *infra*, note 40.

17. Short adjudication, *supra*, note 7, at 18.

18. This "intrusion upon seclusion" refers to both physical intrusion and to other types of intrusion upon one's "solitude." See generally Restatement (2d) *supra*, note 13, at 652B.

19. See *infra* note 37 and accompanying text (discussing the details of the recommendation). The recommendation was repeated in Calcutt mark II, ch.7, p.51-2.

adjudication - is that one's privacy may be invaded in the investigative phase leading to an anticipated publication, not only by the publication itself. This can mean psychic or emotional privacy, not only physical privacy. Thus, Ms Short's privacy was invaded by the "[i]ntrusions and inquiries into [her] private life" - to quote the code language. The Commission considered *inquiries* into her relationship with John Daniel to be justified in the public interest,²⁰ while inquiries made to her former husband seeking a salacious photo of the MP were not.²¹ None of the information disclosed as a result of either inquiry, however, rose to the level of public interest that would have justified its publication.

Under the laws of most American state jurisdictions, this is certainly the case. The motive of the publisher/defendant is simply not discussed. The only instance in which it arguably is relevant is when a public official or public figure is the plaintiff. In those cases, the rules of *New York Times* and its progeny, which establish different standards of intent for those allegedly defaming different types of defamation plaintiffs, also apply to public official and public figure plaintiffs bringing invasion of privacy actions. The level of culpability which public figure/official defamation plaintiffs must prove is "actual malice," further defined as "knowledge of falsity" or publication "with reckless disregard as to truth or falsity" of the statement.²²

In the 1967 case of *Time, Inc. v. Hill*, the US Supreme Court held that the First Amendment precluded application of a New York privacy statute to redress reports of matters of public interest, even if they depicted the plaintiffs in a "false light," absent proof that the defendant had published the report with "knowledge of its falsity or in reckless disregard of the truth."²³ However, the actual malice standard defined in *New York Times* does not transfer comfortably or sensibly into any privacy context except the false light one. This is because "knowledge of falsity" or "reckless disregard" as to truth or falsity is irrelevant to

20. Short adjudication, *supra*, note 7, at 6-7.

21. *Id.*, p.8.

22. *New York Times v. Sullivan*, (1964) 376 US 254; see generally Restatement (2d) *supra*, note 13, at 580A.

23. (1967) 385 US 374, 378.

"private facts" cases, in which "privacy," not "falsity" is the key inquiry. American courts have exhibited some confusion as to how this standard should be applied in privacy cases. Some have roughly translated actual malice as knowledge that a publication would constitute an invasion of privacy or reckless disregard as to whether it would or not.²⁴ Most courts have determined that the standard applies only to false light cases.²⁵

Thus, a US legal analysis of the Short complaint might find the publisher's bad motive relevant, but it is unlikely because her allegations would be considered publication of private facts rather than a false light type of invasion of privacy, the latter being generally necessary to trigger an "actual malice" analysis.

The adjudication discussed at length the motives of both Ms Short and the *News of the World*. This may be because each party sought to focus on the reprehensible motive of the other. As previously noted, Ms Short alleged that the *News of the World* was pursuing a long-standing vendetta against her over her political crusade to ban "page 3 girls," and the Commission gave credence to the relevance of this motive by acknowledging the "inescapable suspicion" that the newspaper sought to embarrass Ms Short in retaliation for her political stance on pornography. Motive, we suggest, should not necessarily be an issue with regard to invasion of privacy. Either an invasion has occurred, or it has not. The motive of the publishers is of no moment. Generally, a complainant's behaviour is relevant only insofar as he or she may have waived any right to action, because of previous publication of the sensitive information, or because he or she may otherwise have consented to the disclosure.²⁶ With the Short complaint, the Commission apparently considered her behaviour relevant because the *News of the World* claimed that Ms Short's speech in the House of Commons in January, 1991, had provoked it to

24. See, eg, *Lerman v. Flynt Distributing Co., Inc.* (2d Cir. 1984) 745 F.2d 123, cert. denied, (1985) 471 US 1054 (implicitly applying "actual malice" - though not defining it - to a commercial appropriation type of privacy case).

25. See, eg, *Machleder v. Diaz*, (1987) 801 F.2d 46, cert. denied, 107 S.Ct. 1294; *Lorentz v. Westinghouse Elec. Corp.* (W.D.Pa. 1979) 472 F.Supp. 946.

26. See generally Restatement (2d), *supra*, note 13, at 652D, comment b; see *infra*, text accompanying notes 42-48.

publish the objectionable story. During her parliamentary speech, Ms Short strongly condemned the behaviour of the paper and its staff, including that of editor Ms Patricia Chapman, who coincidentally was the chairperson of the committee that drafted the industry's Code of Practice and who, from its inception, was a member of the Press Complaints Commission. Ms Short said she made the speech in the expectation that publication of a *News of the World* article was imminent. The *News of the World* editor resisted Ms Short's complaint, in part by claiming that it had not decided to publish a story based on its investigations until Ms Short made her speech in the House of Commons, after which the editor claimed that an article and editorial were the "only effective way" to answer Ms Short's accusations and to correct her alleged inaccuracies.²⁷ The Commission was sympathetic to this justification, but on the whole accorded far too much attention, and therefore implicitly assigned far too much importance to the motive issues.

The Press Complaints Commission appears never to have been quite able to sort through the complexity of Clare Short's complaint, and it stumbled several times because of its lack of understanding about how a privacy analysis might best proceed. For example, the initial inquiry might logically have been whether any invasion of privacy had occurred. Clause 4 asserts the basic unacceptability of "intrusions and inquiries into an individual's private life." But what does "private life" mean? Does it include a person's home or private business address? Information about a person's sexual practices? About a family member's drug problem? The Commission did not, in the Short adjudication, and has not in handling any subsequent complaint, dealt with the meaning of "privacy" or "private life" as a term of art representing a concept on which a complaint may be based. Beyond this threshold issue, the Commission should next determine whether there has been an "intrusion" or "inquiry" into, or "publication" relating to, this private sphere. If the answer is "yes" the defences of "consent" and "public interest" become relevant.

27. *Id.*, p.9.

The Short adjudication may represent the least satisfactory adjudication of the Press Complaints Commission. This is not necessarily because it got the result wrong. Rather, it is because it did not proceed with such step-by-step analysis. Accordingly, very few free-standing principles about privacy can be garnered from it. The adjudication, in its construction and language, lacked a sense of juridical purpose. The Commission seemed to focus only on making a decision about a matter at hand; it was seemingly oblivious to any implications it might have for subsequent cases. It was similarly oblivious to its obligations to interpret in a meaningful way the Code of Practice, and to provide guidelines of acceptable press behaviour for both the media and the public.

The following discussion is organized according to various distinct issues that may arise in the course of a methodical analysis of privacy complaints. Although the Commission has not frequently issued adjudications that refer to these matters expressly, various principles may be discerned from a close reading of the relevant adjudications.

The Meaning of "Privacy"

Not every matter that a complainant considers an invasion of privacy actually constitutes an invasion into the private sphere of life. The Calcutt Committee discussed the meaning of "privacy" at great length, considering the parameters set by the laws of various other countries. The Committee tentatively concluded that it is the "right of an individual to be protected against intrusion into his personal life or affairs, or those of his family, by direct physical means or by publication of information".²⁸

The report went on to note that the right to privacy "could include" protection against: (a) "physical intrusion;" (b) "publication of hurtful or embarrassing personal material (whether true or false);" (c) "publication of inaccurate or misleading personal material;" and (d) "publication of

28. Calcutt Report, *supra*, note 2, II, 3.7, at 7. The Younger Report discussed the meaning and import of privacy even more extensively than did Calcutt. See generally Younger Report, *supra*, note 1, at ch.4.

photographs or recordings of the individual taken without consent."²⁹ Although the Committee did not expressly acknowledge such, three of these four categories roughly correspond to those recognized by American privacy tort jurisprudence: intrusion, publication of private facts, and false light.³⁰ As regards the first "photography" element of the fourth Calcutt category, it is similar in some instances to the American "appropriation" type of privacy invasion which redresses the grievance of a person whose image has been exploited for commercial purposes.³¹ Despite the Calcutt Committee's apparent dalliance with American privacy concepts, these rather distinct types of privacy invasions are not reflected in the Code of Practice which is enforced by the Press Complaints Commission. As reflected in its quotation above, clause 4 of the Code speaks more generally of "intrusions and inquiries" into an individual's private life being unacceptable. It goes on to enumerate instances when such intrusions may be justified as in the public interest, but it does not provide further guidance as to what manner or sorts of intrusions or inquiries are objectionable.

Both the National Heritage Committee³² and the Government's consultation paper³³ discuss the meaning and importance of privacy as an aspect of human personality. The Code of Practice does not reflect these categories. As noted in relation to the Clare Short case, privacy may refer to either or both psychic privacy and physical privacy. These may be invaded either by *inquiries* into a personal matter, as in the Short case, or by *publication* of personal information.

The sort of information that the Commission considers sufficiently private to be the basis of litigation is difficult to discern from its frequently cursory adjudications. Not a single 1991 adjudication of a clause 4 complaint engages in any

29. *Id.*, II, 3.8.

30. Restatement (2d), *supra*, note 13, at 652A; Prosser, "Privacy," (1960) 48 Calif.L.Rev. 383.

31. Restatement (2d), *supra*, note 13, at 652C.

32. Paragraphs 47-59, pp.xii-xv.

33. Chapter 3, pp.8-12.

substantive discussion of what is sufficiently "private" to support a complaint on this basis. One could deduce that the Commission deems certain matters sufficiently private simply because complaints based on disclosure of these matters have been upheld under clause 4. Of course, if the Commission has not actually considered the privacy implications of such disclosure, this may be presumptuous and inappropriate. Still, without more explicit guidance from the Commission, it is all that either the media or the public have on which to base their decisions.

Consider the Princess Eugenie adjudication in which the Commission held that *The People's* publication of nude photos of the infant princess breached clause 4.³⁴ In response to the newspaper's defence that the photos were "charming" and "natural", published "good naturedly and affectionately", the Commission responded that such claims were irrelevant, as was the offensiveness of the photos, because they were simply an invasion of privacy.

What the Commission failed to recognize is that issues of offensiveness and naturalness may be evidence of the ultimate issue of privacy invasion. Under the "publication of private facts" prong of American privacy law, for example, a matter disclosed must be sufficiently private to "violate ordinary decencies" or "offend", in order to give rise to a cause of action. Thus, an offensiveness inquiry should not have been so summarily dismissed by the Commission. It assumed, probably correctly, that nude photos of a child, taken surreptitiously and published in a national newspaper, were sufficiently invasive of privacy to justify complaint. Even though the adjudication discounted an "offensiveness" analysis, it perhaps implicitly engaged in one by noting the circumstances of both acquisition and publication of the photos, rather than focusing merely on their content, which, as the Commission noted, would be quite unexceptionable if only displayed in a family album. The Commission missed other

34. Press release No.91-868/No.28, Press Complaints Commission, August 8, 1991 [hereinafter Princess Eugenie adjudication]. The decision to uphold the complaint was also based upon clause 11, which states that journalists should not normally photograph children under the age of 16 without their parents' consent. *Id.*, p.1.

opportunities to distinguish between disclosures which are of a sufficiently *personal* nature to constitute an invasion of privacy and matters which do not violate ordinary decency, even though the subject of them might prefer that they not be made public.

In adjudicating a complaint by the then-leader of the Labour Party, Mr Neil Kinnock, and his daughter, who complained about an article in *Today* reporting a "dust-up" between Mr Kinnock and four youths who were taunting him as he was "ticking off" his daughter, the Commission held that the story did not breach the Code of Practice.³⁵ No particular clause of the Code was ever cited; however, several references were made to the lack of "intrusion into privacy," so it is fair to infer that it was decided on clause 4 principles. Though the Commission did not expressly find such, it might well have concluded simply that the matters published was not sufficiently "private" or "personal" to constitute an invasion of privacy. Instead, it obscured this threshold issue by also noting that politicians seek and must expect regular exposure to the press, implying that "public interest" had more to do with the decision than perhaps it should have.³⁶

An early 1992 adjudication of a complaint by one of us (L.B-C) similarly failed to grasp this crucial issue upon which the decision might have turned. A group of publicly-known figures wrote a letter to the editor of *The Times*, attacking aspects of the Government's Asylum Bill. When the *Evening Standard* responded with an editorial implying the hypocrisy of the authors and noting that Welsh Nationalists might like to know the address of L.B-C's home in Wales (which was given in full in the

35. Press release 91-405/No.14, the Press Complaints Commission, June 5, 1991 [hereinafter Kinnock adjudication].

36. The Press Complaints Commission failed to distinguish between Mr Kinnock and his daughter. The same failure to distinguish between a public official and someone associated with that official may be observed in the incident involving Mr Paddy Ashdown and Mrs Patricia Sullivan, the woman with whom he had an affair. While no complaint was lodged with the Press Complaints Commission in that matter, the injunction granted by the Queen's Bench Division included no explicit consideration of "public interest" and did not differentiate between Mr Ashdown as a public figure and Mrs Sullivan, with whom he was associated. Queen's Bench Division, Minutes of Order, 1992 A. No.485.

editorial) should they desire to burn it, a complaint was lodged with the Press Complaints Commission. The Commission categorized the complaint under clause 4, as an alleged invasion of privacy. To this the *Evening Standard* responded that L.B.-C had waived any right to any such complaint, by allowing his address to be published as part of his entry in *Who's Who*. Ignoring the consent question, the Commission upheld the complaint, perhaps never considering that mere publication of an address might be insufficiently private or personal to give rise to a complaint for invasion of privacy. The gravamen of the complaint was that the editorial served potentially to incite Welsh Nationalists to commit arson, and the adjudication stated that the paper's publication of the address was "reckless."³⁷ Yet because the Code contains no provision proscribing a publication likely to encourage a criminal offence, and because the Commission considers only complaints of acts stating a *prima facie* breach of the Code, the Commission handled the complaint strictly as a privacy one, neglecting its more objectionable character as potentially inciting a crime. It also resorted to the device of holding that the editorial breached the "spirit" of the Code, thus foregoing any substantive analysis of privacy issues.

Various adjudications indicate, some without expressly stating so, that disclosures related to one's sexuality and sexual practices are sufficiently private to merit redress when they are publicly disclosed.³⁸ The Commission upheld one such complaint expressly on the basis of clause 4. The complaint was brought by a woman who had been identified as one of a man's three

37. Blom-Cooper adjudication, Report No.7, the Press Complaints Commission, March 1992, at 6. On the day of the release of the adjudication the *Evening Standard* published the adjudication and an editorial justifying its earlier editorial. One member of the Press Complaints Commission, Mr Max Hastings (editor of the *Daily Telegraph*) subsequently announced that he was not present at the Commission's meeting to adjudicate, and disagreed with the verdict.

38. The Code of Practice contains a separate provision regarding irrelevant disclosures relating to "sex or sexual orientation." Code of Practice, *supra*, note 4, at clause 14. The Rachael Webb complaint, discussed below, construed this section.

lovers.³⁹ Correctly discerning that truth or falsity was not the issue, the Commission declined to make a finding of fact on conflicting allegations of truth and falsity stating simply that this violation of the complainant's privacy was "impossible to justify."⁴⁰

Consider also two adjudications in which sufficient information about a sex crime was published, so that in one case the victim was identifiable and in the other she was "likely to be identified." In both cases the Commission upheld the complaints, though these decisions were likely based on separate Code sections, specifically clauses 12 and 13. These clauses provide that the press should not identify child victims of sexual offences nor other victims of sexual assault, unless, by law, such identification is permissible. In neither adjudication was any specific clause cited - not 4, 12, nor 13 - nor were privacy concerns mentioned. In one matter the Commission noted the editorial duty to "protect the identities of young persons who are believed to have been the victims of sex crimes,"⁴¹ reflecting the language of clause 12. In the other, it expressed "profound sympathy with the victim," focusing upon the additional agony she would suffer because of the offending publication.⁴²

Although these adjudications fail to cite any specific clause of the Code, one may reasonably infer that the interest at issue in these cases was the victim's privacy interest. Suits that have arisen in the US from public disclosure of a victim's name have been brought under state privacy laws because the matter made public is such an intensely private one - and one for which a stigma still attaches to the victim, albeit through no fault of her own.⁴³

39. Press release 91-204/No.16, Press Complaints Commission, June 10, 1991.

40. *Id.*, p.2.

41. Press release 91-469/No.42, Press Complaints Commission, October 11, 1991.

42. Press release 91/1154/No.69, Press Complaints Commission, December 13, 1991.

43. These privacy suits have not been successful because of the overriding free speech interests protected by the First Amendment to the US Constitution. See, *Florida Star v. B.J.F.*, (1989) 491 US 524; *Cox Broadcasting Corporation v. Cohn*, (1975) 420 US. However, the privacy interest of the

Without more attention to the very essence of an invasion of privacy claims, the Press Complaints Commission effectively encourages a variety of even moderately offensive publications to be analysed as such.⁴⁴ If the Commission is to rise to Calcutt's challenge to state meaningful press guidelines on privacy, it must give more consideration to this threshold issue.

Intrusion upon Seclusion

As noted previously, under American law, intrusion upon one's seclusion may give rise to a privacy action, even if no publication results from information gathered.⁴⁵ Indeed, as noted previously, the Calcutt Committee recognized the seriousness of such invasion, and recommended that certain types of physical intrusion should be criminal offences in England and Wales. These included: (1) entering private property, without consent of the lawful occupant, with intent to obtain personal information with a view to its publication; (2) placing a surveillance device on private property, without consent of the lawful occupant, with the same intent; and (3) taking a photograph, or recording the voice, of an individual who is on private property, without his consent, with a view to its publication and with intent that the individual should be identifiable.⁴⁶

Physical privacy invasions arguably occurred in several scenarios that gave rise to complaints adjudicated by the Commission in its first 18 months of operation. Only two of these, both brought by *Sunday Sport* publisher Mr David Sullivan, were, however, analysed under clause 4.⁴⁷ In one adjudication

victim in preventing disclosure of the information is undisputed.

44. Calcutt Committee Report, *supra*, note 2, II 10.13, at 39.

45. See, *supra*, note 15 and accompanying text.

46. Calcutt Report, *supra*, note 2, II 6.33, at 23. The recommendations were repeated in Sir David Calcutt's "Review of Press Self-Regulation" in March 1993 Ch.2135. Chapter 7, pp.51-55, in particular paras.7.25 and 7.26 at p.55.

47. Two others might have been analysed as privacy complaints, although the Commission decided them on different grounds. *The News*, Portsmouth, took and published a photo of the mother of a missing boy, along with her companion. Although the couple had repeatedly refused

the Commission declined to uphold Mr Sullivan's intrusion complaint⁴⁸ and in the other the intrusion issue was settled by an apology from the offending paper.⁴⁹ The first was against the *News of the World* which published a photo of Mr Sullivan's new house, taken from within the property's outer perimeter wall. Although the editor saw fit to offer an apology for publication of the photo, conceding the invasion of privacy, in a very similar matter the Press Complaints Commission ruled in favour of the *Daily Mail*, which had also published a photo of Mr Sullivan's home. In the second matter, the *Daily Mail* photographer took the offending photos from a helicopter hovering above the property. The height of the helicopter and the length of time for which it hovered over the property were in dispute, though the newspaper conceded that the minimum time was five minutes and the minimum height was 500 feet. The *Daily Mail* took the stance that the photographs were of public interest, because the

to be interviewed or photographed during the course of the search for her son, a *News* reporter, while trespassing on private property, took the objectionable photo. The couple were, however, in a public place when the photo was taken. The PCC upheld the complaint on this basis of clause 9 which calls for sympathy and discretion in cases of personal grief. Press release 91-463/No.30, Press Complaints Commission, August 19, 1991. The complaint might well have been analysed under clause 4 as an invasion of privacy issue. Indeed, the invasion complained of is similar to that in para.(3) of the Calcutt recommendations on criminalizing certain invasions.

One other complaint might have been classified as a physical intrusion case. A press agency employee asked an 11-year-old boy to snatch a photo of a relative about whom the agency was writing a story. A complaint against the agency was upheld, though neither privacy nor any specific clause of the code was mentioned in the adjudication. Press release 91-409/No.19, Press Complaints Commission, July 15, 1991.

48. David Sullivan adjudication, Report No. 8, the Press Complaints Commission, at 6 [hereinafter David Sullivan I].
49. David Sullivan adjudication, Report No. 8, the Press Complaints Commission, at 8 [hereinafter David Sullivan II]. A second issue in the complaint, arising from the *News of the World's* publication about Mr Sullivan's previous conviction for living off immoral earnings by running a massage parlour, was not upheld. The Commission considered the information relevant to a matter of public interest. See, *infra*, notes 55-56 and accompanying text.

house was one of the largest built in Britain in recent years, and the Commission agreed, without further explanation or analysis under the specifics established in clause 4.

The Commission did state that the existence of a public interest did not deny Mr Sullivan a "fair measure of privacy,"⁵⁰ whatever that may mean. Given the dispute about the extent of the disturbance, however, the Commission said only that it was unable to conclude that either the taking or publishing of the photograph breached clause 4. We think the Commission was remiss in failing to address the intrusion issues, particularly in light of the Calcutt Committee's particular concern - to the extent of advocating criminal sanctions - about precisely this type of privacy intrusion. Perhaps the Commission was reticent to act in reliance upon the Calcutt recommendation and to uphold the complaint because the "trespass" was not a typical one in that the property of the complainant was not physically touched. Relying on such a technicality, however, ignores the virtually unlimited manoeuvrability and operational capabilities of the helicopter, which makes this form of aerial surveillance more susceptible to misuse than ground surveillance as an instrument of unreasonable intrusion upon private activities.

Consent or Waiver as a Defence

A few of the Commission's privacy adjudications have expressly acknowledged the relevance of a consent defence. The theory is that if a matter is already public knowledge, particularly by consent of the potential complainant, the party has no right to claim redress under a privacy theory when a matter is, in essence, re-published.

A complaint brought by Chris Quentin, former star of "Coronation Street," headlined "Quentin Sister's £200 for kinky sex" and linking him with his sister's promiscuous lifestyle, was not upheld because the Commission determined that he "had already placed his own private life so firmly in the public domain by encouraging ... stories about it." Accordingly, he had "no

50. *Id.*

privacy left to invade" and clause 4 had not been violated.⁵¹

For similar reasons a complaint brought by Rachael Webb, a Lambeth councillor, was not upheld. Ms Webb complained to the Commission when several newspapers mentioned her 1983 sex-change operation in otherwise general articles about the London borough's Labour politicians.⁵² Although her claim was brought under clause 14, which encourages the press to avoid pejorative reference to a person's sex or sexual orientation, privacy concerns were implicated, and it could well have been brought as a clause 4 complaint. Indeed, the Commission expressly recognized that "sexual conditions and orientations are generally private matters on which newspapers are not justified in reporting."⁵³ However, because Ms Webb had previously spoken openly to the press about being a transsexual, the Commission found the newspaper's reference to her sex change a permissible comment. In effect, it determined that she had waived any right she might previously have had to complain.

In the Kinnock complaint, already discussed above in relation to the meaning of privacy, one of the disclosures about which he complained was the publication of his home address. In what might be labelled a finding of waiver or consent, the Commission noted that the location of the home was sufficiently well-known, so that further publicity of it in the offending article did not constitute a breach of the Code.⁵⁴ Contrary to that opinion, the complaint by L.B.-C, also discussed above, did not turn on the complainant's previous waiver with regard to the information at issue. Indeed, in spite of the fact that the consent issue might have been dispositive, the adjudication mentioned the issue only in noting that the *Evening Standard* had raised it as a defence.

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51. Press release 91-160/No.22, Press Complaints Commission, July 21, 1991. While few would quarrel with the decision reached, the PCC did not address in its adjudication whether he had previously disclosed this particular bit of private information. Rather, the focus was upon his openness generally and on other instances when he had sought publicity.
 52. Press release 91-304/305/329/No.23, Press Complaints Commission, July 26, 1991.
 53. *Id.*, p.2.
 54. Kinnock adjudication, *supra*, note 25, at 3.

One highly-publicized Commission decision⁵⁵ turned on the issue of consent. Ruling that two newspapers did not invade family privacy when they published the name of Jennifer Bennet as the child featured in Labour's election broadcast on the National Health Service, the Commission noted that the parents' actions in agreeing to allow their daughter's case to be used in the broadcast had propelled the matter of her treatment into the public domain. Even though the child's parents had given information of her case study to the Labour party, with the proviso that her identity would not be revealed, their action made the child's treatment "an appropriate subject of investigation by newspapers."⁵⁶ Accordingly, the newspapers were deemed not to have breached the Code of Practice. Interestingly, although the adjudication mentioned invasion of privacy, it did not cite clause 4 of the Code. Nor did it engage in a public interest analysis, apparently considering "consent" to be the threshold issue.⁵⁷ As with so many other issues, the Commission's approach appears to be a scattershot one - attuned to threshold issues at one turn, oblivious to them at the next.

Public Interest Test

The Calcutt Committee expressed unease with a "public interest" concept,⁵⁸ suggesting instead the concept of "seriously anti-social conduct." The Government's consultation paper suggested that

55. The decision was not considered by the Press Complaints Commission to be an adjudication and, indeed, has not been included in its regular reports summarizing adjudications. However, the Commission clearly offered an opinion on the matter. See "Papers Cleared of Privacy Breach in Naming Election Broadcast Girl," (1992) *The Guardian*, April 29.

56. *Id.*

57. Oddly, in dealing with yet another privacy complaint, the Commission apparently deemed the consent "defence" sufficient to cause it to conclude that no *prima facie* breach of the Code was committed. Accordingly, the complaint was not adjudicated. See "No *Prima Facie* Breach of the Code," Report No.7, the Press Complaints Commission, No.53, p.18.

58. Calcutt Committee Report, *supra*, note 2, 19-3.23, at 8-9, see also David Calcutt, "Cowboys Cool it in the Last Chance Saloon," (1991) *The Guardian*, June 17, p.23.

the Calcutt Committee was right to draw attention to the vagueness of the term "public interest," and stated that it would be preferable to indicate those matters that are of public interest, such as "crime or seriously anti-social conduct; public health or safety; the discharge of a public function; the correction of a misleading statement."⁵⁹ The paper invited comments as to how the public interest definition should be formulated, and in particular whether it is preferable to define it in special terms or to be most specific. The comparable concept in US privacy jurisprudence has until recently been "newsworthiness," a term of art so broadly construed that it is now considered to be essentially whatever the press considers it to be. The preferred option in the US is now, anything which is of "legitimate concern to the public."

The Code of Practice, that the Press Complaints Commission is charged with enforcing, embraces the concept of "public interest" and employs it as a justification or defence for an invasion of privacy. In the amended Code of Practice, ratified by the Press Complaints Commission on June 30, 1993, a public interest exception can now be relied on in relation to new provisions barring bugging devices and the use of long-lens cameras to photograph people on private property. Exceptions are allowed only in the public interest, which is newly defined as "detecting or exposing crime or a serious misdemeanour; protecting public health and safety; protecting the public from being misled by the statement or action of an individual or organization." The amended Code goes on to state that in any cases raising issues beyond those definitions, the Press Complaints Commission will require a full explanation by the editor, seeking to demonstrate how the public interest was served.⁶⁰ It is not clear whether the defined exceptions are

59. *Id.*, para.5.66, p.39.

60. There is also a much expanded provision on dealing with any case involving a sexual offence against a child. This is designed to ensure that the identity of the child cannot be deduced from the disclosure of related information. This makes clear that the adult should be identified but the child should not; that terms such as "incest" should be avoided; and that care should be taken that nothing in the report should imply the relationships between the accused and the child. Finally, in addition

applicable to justification for a defence to an alleged breach of the privacy provisions in the Code. It is also difficult to understand the reference to "misdemeanour," a criminal law concept abandoned by the legislature in 1967.

Even among the few adjudications that have assessed the "public interest" rationale, it is difficult to discern any consistent application of the term. None has referred explicitly to the guidelines set forth in clause 4. Consider again the Clare Short adjudication, in which the Commission stated that "public interest" is not synonymous with whatever interests the public. It emphasized that maintenance of the distinction between those two concepts is crucial, especially with respect to those people who are in public life.⁶¹ Contrast these comments with those responding to Neil Kinnock's complaint. Stating that "[l]eading politicians seek, experience and must expect regular exposure in the press," and that the article "dealt largely in trivia about Mr Kinnock and his family in which *readers might be interested*," the Commission declined to uphold the complaint.⁶² Although both decisions were probably decided correctly, their language regarding what does and does not constitute "public interest" is internally inconsistent. The adjudications send mixed messages about the sorts of justifications to which the Commission is sympathetic, one scoffing at public curiosity, the other legitimizing it.

No doubt any adjudicator in this difficult area of regulation will be influenced by the way the courts have interpreted the public interest defence in actions for breach of confidence and in defamation cases. In a case in the former class of action, Ungood-Thomas, J, in *Beloff v. Pressdram*⁶³ said that justification

to their general responsibility for the actions of their journalists, editors are specifically required to ensure that the code's provisions on harassment are observed. In particular, unless justified on public interest grounds, journalists may not photograph individuals on private property without their consent; should not persist in telephoning or questioning individuals after having been asked to desist; and should not remain on the property when asked to leave.

61. Short adjudication, *supra*, 10.

62. Kinnock adjudication, *supra*, 29.

63. [1973] 1 All ER 241, 260P.

for breach of confidentiality could be founded on "matters carried out or contemplated in breach of the nation's security, or in breach of law, including statutory duty, fraud, or otherwise destructive of the country or its people including matters basically dangerous to the public, and doubtless other misdeeds of similar gravity."

In *Francome v. Mirror Group Newspaper* Sir John Donaldson, MR referred to the public interest in exposing conduct which involves a breach of the law or is anti-social, that is to say, seriously contrary to the public interest.⁶⁴

Another adjudication, subsequent to both the Short and Kinnock decisions, and dealing with a lower echelon public official, a leader of a county council, might also have "public interest" implications. The articles of which the councillor complained, published in a local paper, stated that he had refused - despite persistent attempts by the press - to disclose his occupation.⁶⁵ The councillor complained that the reports were misleading and unfair. No express ruling was made on any clause 4 privacy claim. The Commission, in what might be considered an *obiter dictum*, stated that the newspaper did not "unjustifiably invade his privacy" by seeking to learn his occupation: "When a politician holding important office regionally or nationally refuses to respond to a newspaper's request for information which should be in the public domain ... the paper may pursue [an] attempt to encourage or provoke disclosure."⁶⁶ This view seems to assume that such information about the politician - although not a local one - is in the public interest.

In a statement in June 1992 responding to media hype, speculation and furore about the marital difficulties of the Prince and Princess of Wales, the Commission shed some further light on the public interest concept. In the most strongly-worded pronouncement of its brief history, the Commission conceded the existence of a "legitimate public interest in the situation of the heir to the throne." Noting that the state of the marriage was

64. [1984] 1 WLR 892, 898A.

65. Press release 91-1122/No.68 Press Complaints Commission, December 11, 1991.

66. *Id.*, p.3.

already in the public domain by virtue of the "outward behaviour of the spouses," the Commission nevertheless opined that the manner and tone of reporting on the private lives of the couple was beyond doubt in breach of the Code of Practice.⁶⁷ The implication of the statement was that even a finding of "public interest" cannot necessarily justify intrusive and speculative treatment, and what the Commission called "dabbling [journalistic] fingers in the stuff of other people's souls" in a manner which adds nothing to the discussion of that matter of public interest.⁶⁸ No Code section was cited in the Commission's statement, perhaps because it was not strictly an adjudication, but only pontificating precipitately about a widely-publicized event.

Perhaps the most unhelpful "public interest" decision was that made in the David Sullivan adjudication, noted above in relation to the intrusion issue. Without even mentioning the complainant's occupation and notoriety as a "sex publisher" or "pornographer," the Commission summarily concluded that publication of aerial view photos of his new house was in the public interest, apparently merely because it was among the largest built in the country.⁶⁹ The Commission may have been deducing from this that the luxury mansion was financed with the profits of pornography, a matter that might indeed have been in the public interest.⁷⁰ Because the Commission never expressly

67. "Odious" example of Royal reporting, *The Guardian*, June 9, 1992, p.2, col.4 (providing a full text of the Press Complaints Commission statement about media coverage of the Prince and Princess of Wales). Incidentally, the statement was not issued in response to a specific complaint. Rather, the Commission was apparently unprompted in taking upon itself the task of commenting on the situation. Indeed, it was motivated by self-interest, noting in its statement that media behaviour in this regard was jeopardizing the future of the Commission and the self-regulatory system.

68. *Id.*

69. David Sullivan I, *supra*, note 42.

70. Indeed, in adjudicating the other complaint by Mr David Sullivan, the Commission, in speaking to the "public interest" test, acknowledged the relevance of Mr Sullivan's role as "publisher of sex magazines and national daily and Sunday publications, both of which advertised chat lines." In that instance, the objectionable article claimed that construction

states this, however, the public and the media are left guessing as to the real basis of the decision and can discern no certain guidance from the adjudication. Such adjudications make a mockery of the public interest test, a defence which ideally should spawn a comprehensive jurisprudence, striking the appropriate balance between respect for an individual's privacy and the need to encourage the media to investigate and report on matters of importance to the health, safety and education of a decision-making populace.

Conclusion

An essential function of any regulatory system - particularly a self-regulatory system - is to provide to the industry being regulated, as well as to the public, adjudications clarifying the precise scope and meaning of the provisions of the relevant code of conduct. That is precisely what the Younger Report asked for 20 years ago. Although the Code of Practice adopted by the Press Complaints Commission includes a clause on privacy, adjudications interpreting and applying it have proved internally inconsistent and have provided little guidance as to precisely what standards are expected of journalists and editors. The decisions frequently include only summary analysis, thus failing to provide insight into the bases for them. Furthermore, that analysis, which the adjudications do feature, often misses the most obvious points and hence obscures the issues that should be dispositive.

The quality of output of Commission adjudications cannot encourage anyone to conclude that the industry's "last opportunity" to make self-regulation work has been grasped with that degree of effectiveness which would allay disquiet about the lack of press responsibility. Indeed, Calcutt Mark II stated that "the press has demonstrated that it is itself unwilling to put in

of Mr Sullivan's new home had been financed by profits of his business, which was based on pornography and sex shops. David Sullivan II, *supra*, note 43. The Commission's adjudication does not indicate whether this same link was explicitly stated in the *Daily Mail* story and, if so, whether the information influenced its decision on the "public interest" issue.

place a regulatory system which commands [respect], not only of the press ... but also of the public, and which fairly holds the balance between them." Sir David Calcutt, QC, made no analysis of the Press Complaints Commission's case law (as we have sought to do in respect of clause 4 on privacy) yet he saw "no realistic possibility of that [unwillingness] being changed by voluntary action."⁷¹

Whatever government may decide to do about the regulatory system for the future conduct of the press, it is tolerably clear that there will soon be some private law remedy for the infringement of privacy. While the proposal is being translated into legislative action, and some statutory guidelines given to the crucial issue of the public interest defence, the industry and the public will look to the Press Complaints Commission for assistance in a delicate area of social policy - the more so if Government withdraws from its move towards a law on privacy. The Press Complaints Commission must in the future deal more thoughtfully with the "public interest" concept. Second only to the basic notion of what is "private," the breadth of public interest defence will have more impact on the Commission's privacy jurisprudence than any other sub-issue. Editors and journalists, as well as the public, must be provided with meaningful guidelines about precisely what is in the public interest, lest it be concluded that any determination of what is permissibly publishable on grounds of newsworthiness is left to the self-serving interests of the press. It is a prime function of a regulatory body (even more so a self-regulatory one) that it should delineate the boundary between freedom of expression and editorial responsibility.

71. Paragraph 5.29, p.42.