REVIEW ESSAY

SEX PANIC OR FALSE ALARM? THE LATEST ROUND IN THE FEMINIST DEBATE OVER PORNOGRAPHY

A REVIEW ESSAY ON CATHARINE A. MACKINNON'S *ONLY WORDS* AND NADINE STROSSEN'S *DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS*

Margaret McIntyre*

INTRODUCTION

For nearly two decades, feminists have debated whether pornography causes harm to women and what, if anything, should be done about it.[1] Although the word "pornography" ostensibly refers to a relatively narrow class of sexually explicit material, the

* J.D., CUNY Law School, 1995. The author wishes to express her appreciation to Ruthann Robson for her comments and support, and to the members of the UCLA Women's Law Journal for their valuable contributions.

1. The group Women Against Pornography was formed in 1976. One of the earliest, most influential, and controversial indictments of the pornography industry is found in ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN (1980). Other early critiques of pornography from a feminist perspective include SUSAN GRIFFIN, PORNOGRAPHY AND SILENCE: CULTURE'S REVENGE AGAINST NATURE (1981); TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY (Laura Lederer ed., 1980). For a recent collection of feminist antipornography essays, see MAKING VIOLENCE SEXY: FEMINIST VIEWS ON PORNOGRAPHY (Diana E.H. Russell ed., 1993) [hereinafter MAKING VIOLENCE SEXY].

Feminist works that oppose restriction of sexual expression include CAUGHT LOOKING: FEMINISM, PORNOGRAPHY & CENSORSHIP (Nan Hunter ed., 1986); PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY (Carol Vance ed., 1984); POWERS OF DESIRE: THE POLITICS OF SEXUALITY (Ann Snitow et al. eds., 1983); Nan D. Hunter & Sylvia A. Law, *Brief Amici Curiae of Feminist Anti-Censorship Taskforce, et al., in* American Booksellers Association v. Hudnut, 21 U. MICH. J.L. REF. 69 (1987-88). A more recent and comprehensive discussion of the evolution of the feminist pornography debate, from an anticensorship perspective, is presented in Carlin Meyer, *Sex, Sin, and Women's Liberation: Against Porn-Suppression*, 72 TEXAS L. REV. 1097 (1994).

debate is more fundamentally about how to eliminate the social practice of defining women solely in terms of sexuality. On a practical level, the debate is over the way to eliminate the very real problem of sexual violence. In a more abstract sense, the pornography debate is a struggle for power waged within the larger constitutional arena of "freedom of expression." That is, the terms of the debate are determined by the law and the debate in turn impacts on other legal struggles for power that involve expression, particularly hate speech and sexual harassment.

This Review Essay assesses the latest round in the feminist pornography debate. Catharine A. MacKinnon's *Only Words*[2] and Nadine Strossen's *Defending Pornography, Free Speech, Sex, and the Fight for Women's Rights*[3] present opposite ends of the spectrum of views on the subject. It is useful to examine the two books together because *Defending Pornography* is dedicated to refuting the efforts of antipornography feminists, particularly the antipornography legislation developed by Catharine MacKinnon and Andrea Dworkin,[4] which is defended by MacKinnon in *Only Words*.

For an excellent exploration of the differences among all opponents of pornography, see 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.

2. CATHARINE A. MACKINNON, ONLY WORDS (1993). Analyses of *Only Words* in law reviews include C. Edwin Baker, *Of Course, More Than Words*, 61 U. CHI. L. REV. 1181 (1994) (book review); Nadine Taub, *A New View of Pornography, Speech, and Equality or Only Words?*, 46 RUTGERS L. REV. 595 (1993) (reviewing ONLY WORDS); David C. Dinielli, Book Note, *Only Words*, 92 MICH. L. REV. 1943 (1994); Elizabeth Matthews, Recent Publication, *Only Words*, 29 HARV. C.R.-C.L. L. REV. 599 (1994); Book Note, *Stripping Pornography of Constitutional Protection*, 107 HARV. L. REV. 2111 (1994) (reviewing ONLY WORDS).

3. NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS (1995).

4. American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd without opinion*, 475 U.S. 1001 (1986). The antipornography ordinance adopted by the city of Indianapolis, Indiana provided a private cause of action for anyone who could prove she was injured through pornography. The ordinance was ultimately found unconstitutional by the U.S. District Court for the Southern District of Indiana, 598 F. Supp. 1316 (1984), and by the Seventh Circuit of the U.S. Court of Appeals, 771 F.2d at 323. The ordinance at issue in *Hudnut* defined pornography as:

> [T]he graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:
>
> (1) Women are presented as sexual objects who enjoy pain or humiliation; or
>
> (2) Women are presented as sexual objects who experience sexual pleasure in being raped; or

Catharine MacKinnon's *Only Words* is an expansion of her argument that pornography causes harm and that the law should change to recognize and alleviate that harm.[5] MacKinnon argues that the legal approach to pornography should consist of a balancing test that gives as much weight to the right to equality as to the right to free speech. She divides her argument in *Only Words* into three sections. The first section introduces the ways that pornography functions as harmful conduct and assesses the *Hudnut*[6] decision. The second section explores sexual harassment law in relation to freedom of expression. The third section lays out MacKinnon's theory for how the conflict between equality and free speech should be reconciled.

In stark contrast to MacKinnon, Nadine Strossen, president of the American Civil Liberties Union and professor of law at New York Law School, defends the availability of pornographic material. In *Defending Pornography*, Strossen defends the right to produce or consume pornography and argues that pornography can be valuable sexual expression.[7] Her premise is that the feminist movement to restrict pornography, led by Catharine

---

(3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or
(4) Women are presented as being penetrated by objects or animals; or
(5) Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or
(6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.

Id. at 324 (quoting INDIANAPOLIS AND MARION COUNTY, IND., CODE ch. 16, § 16-3(q)). The statute also provided that the "use of men, children, or transsexuals in the place of women in paragraphs (1) through (6) above shall also constitute pornography under this section." *Id.*

According to the decision of the Seventh Circuit, the ordinance provided a cause of action for persons injured through the trafficking in pornography, through coercion into pornographic performance, and through the "[f]orcing of pornography on any woman, man, child, or transsexual in any place of employment, in education, in a home, or in any public place." In addition, anyone injured by someone who has seen or read pornography was given a right of action against the maker or seller. *Id.* at 325-26 (citing § 16-3(g)(4) and (5) of the Indianapolis Code).

5. *See, e.g.*, CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 127-213 (1987) [hereinafter MACKINNON, FEMINISM UNMODIFIED]; CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 195-214 (1989) [hereinafter MACKINNON, TOWARD A FEMINIST THEORY].

6. *See* STROSSEN *supra* note 3.

7. "Throughout this book, I use the term 'pornography' to refer to the sexually oriented expression that MacKinnon, Dworkin, and their supporters have targeted

MacKinnon and Andrea Dworkin, is a greater threat to women's equality than is pornography.

Strossen's main concern is that this country is now in a "sex panic"[8] in which all forms of sexual expression are under attack. Throughout *Defending Pornography*, Strossen frequently refers to the antipornography feminists as "MacDworkinites"[9] and directs the book at discrediting their ideas because she believes that they have "played a very significant role in fomenting this sex panic."[10] At issue in her book is not only the constitutionality of antipornography legislation but also the legal theory put forth by MacKinnon and other antipornography feminists. The book attacks the theory as well as its impact on sexual harassment law.

Both Strossen and MacKinnon make valuable contributions to the pornography debate with these books. However, each author's position is limited by the extremity of her views.[11] In comparing the relative merits of the two authors' arguments, this Review Essay concludes that Strossen's concern that we are living in a "sex panic" is in fact a false alarm, and that it is a mistake to unequivocally defend pornography simply because it is sexual expression. Such "free speech absolutism"[12] is a greater threat to

---

for suppression. As I show, though, this definition is so amorphous that it can well encompass any and all sexual speech." *Id.* at 19.

8. *Id.* at 20. In 1993, the New York Law School Law Review combined all four of its volumes to produce a single edition devoted to articles on the "sex panic" to which Strossen refers. Symposium, *The Sex Panic: Women, Censorship and "Pornography,"* 1-4 N.Y.L. SCH. L. REV. 1 (1993).

9. STROSSEN, *supra* note 3, at 13. Strossen attributes the creation of the term "MacDworkinites" to Marcia Pally, founder of Feminists for Free Expression.

10. *Id.* at 20.

11. In a review of *Defending Pornography*, Abbe Smith comments on the significance of Strossen's and MacKinnon's roles as lawyers in shaping their approaches to this debate:

> The problem with *Defending Pornography*—as with much of Ms. MacKinnon's writing—is that it is an argument rather than a searching examination. Perhaps because both Ms. Strossen and Ms. MacKinnon are Ivy League-educated lawyers, trained in the art of advocacy, they mark out their positions first and then supply the supporting evidence. But arguments are less effective when framed in all-or-nothing terms with a preference for alarmism over evidence.

Abbe Smith, *Freedom to Be Grossed Out: First Amendment Absolutism from the First Female Head of the A.C.L.U.*, N.Y. TIMES BOOK REV., Jan. 22, 1995, at 13, 14.

12. Strossen has recently clarified the ACLU position on free speech absolutism:

> Free speech is not, as some assert, absolute, and the ACLU has never taken such a position. Nonetheless, the ACLU proudly bears the label "free speech absolutist." The parameters of the free speech debate are

women's rights than are the ideas of Catharine MacKinnon. Although MacKinnon's insights into the harms caused to women by pornography do not always translate well into legally actionable harms, they are nevertheless extremely valuable to feminists seeking to end sexual violence.

This Essay first summarizes the positions of the two authors within the pornography debate as presented in these books. The second section analyzes specific drawbacks of Strossen's position as a free speech absolutist, with particular attention to her views on the economic effects of pornography restriction and on women's capacity to make moral choices. The third section assesses Strossen's views in the context of the Supreme Court's ruling on hate speech.[13] The fourth section explores the interrelationship of the pornography debate with racial and sexual harassment law, focusing on the two authors' different assessments of trends in sexual harassment law.

The Essay then addresses in detail the merits of Strossen's argument that regulation of sexual expression as proposed by MacKinnon would result in unfair discrimination against lesbian and gay materials. Thus, this section examines some of the drawbacks of MacKinnon's legal theory of pornography. Finally, the sixth section explores other recently proposed approaches to ending sexual violence, which suggest the direction that future legal theories of pornography should take.

I. Is Pornography Harmful Conduct or Simply Expression?

Although both MacKinnon and Strossen address the impact of pornography on women's lives, often the points of disagreement between them center on the symbolism of the law's treatment of pornography. That is, both are concerned with how the law governing pornography affects society's perception of and treatment of women. Their analyses of the possible harms

---

such that even those who are described as "free speech absolutists" or "purists" do not argue that all words and expressive conduct are absolutely protected. In truth, the only argument between free speech absolutists and others is not over whether speech can be regulated but only over when it can be regulated. Absolutists impose a heavier burden of proof on those who seek to justify speech restrictions.

Nadine Strossen, *In the Defense of Freedom and Equality: The American Civil Liberties Union Past, Present, and Future*, 29 Harv. C.R.-C.L. L. Rev. 143, 152-53 (1994) (footnotes omitted).

13. R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992).

caused by pornography tend to conflate concrete problems, such as whether women are harmed in the making of pornography, with symbolic concerns, such as what kind of message would be sent about women if the law deemed that consent was not a defense to an allegation of harm. Throughout this Essay I will identify, where necessary, what level of harm is being addressed by each author (*e.g.*, harm to individual women, whether within or outside of the pornography industry, or harm to women as a group). This should clarify the reasons for the differences between the two writers and, it is hoped, will ultimately point to ways that feminists can come together in the struggle to reduce sexual violence without compromising the right to free expression.

A. *MacKinnon's Position: Pornography is Harmful Conduct*

The divergence of the views held by MacKinnon and Strossen begins with their perceptions of the fundamental nature of pornography. For MacKinnon pornography is harmful conduct, and therefore not entitled to constitutional protection as speech. MacKinnon argues that pornography is what it does, or that pornography is sex.[14] In *Only Words*, MacKinnon argues that under current law, pornography is treated as defamation rather than discrimination.[15] This leads to the perception that pornography's harm is something that is said (the expression of a point of view), rather than something that is done. It is this perception, MacKinnon argues, which leads to the erroneous idea that pornography is only harmful in that some people find it offensive. Therefore, her main argument is that the harm of pornography is not what it says, but what it does, and what it does is discriminate against women.

1. How Pornography Harms Women

MacKinnon argues that there have been instances where words have been recognized as the acts that they are, such as saying "kill" to an attack dog. She notes that a sign saying "White Only" is seen as an illegal act of segregation rather than simply the protected expression of a point of view. Similarly,

14. "There are many ways to say what pornography says, in the sense of its content. But nothing else does what pornography does. The question becomes, do the pornographers — saying they are only saying what it says — have a speech right to do what only it does?" MACKINNON, *supra* note 2, at 14-15.

15. *Id.* at 11.

statements such as "sleep with me and I'll give you an A" are now legally recognized as acts of sexual harassment.[16]

MacKinnon proposes that pornography is conduct rather than speech in that it is sexual abuse which is either photographed or filmed. She notes that, "it is the pornography industry, not the ideas in the materials, that forces, threatens, blackmails, pressures, tricks, and cajoles women into sex for pictures. In pornography, women are gang raped so they can be filmed. They are not gang raped by the idea of a gang rape."[17] The harm in this sense is the harm to models posing for pornography.

MacKinnon addresses those who would counter that the violence in pornography is simulated by responding:

> In pornography, the penis is shown ramming up into the woman over and over; this is because it actually was rammed up into the woman over and over. In mainstream media, violence is done through special effects; in pornography, women shown being beaten and tortured report being beaten and tortured.[18]

MacKinnon challenges the assumption that violent pornography is simply suggestive of, or an idea about, violence. She argues that actual violence is done to real women in the making of violent pornography.

The second and most controversial way that MacKinnon argues that pornography is sex (and as such is conduct, not speech) is her contention that pornography causes men to respond to it with sexual violence. She argues that in this way pornography harms all women. For instance, MacKinnon argues that pornography causes rapists to rape:

> This is not because they are persuaded by its ideas or even inflamed by its emotions, or because it is so conceptually or emotionally compelling, but because they are sexually habituated to its kick, a process that is largely unconscious and works as primitive conditioning, with pictures and words as sexual stimuli. Pornography consumers are not consuming an idea any more than eating a loaf of bread is consuming the ideas on its wrapper or the ideas in its recipe.[19]

---

16. *Id.* at 11-14. MacKinnon was instrumental in developing the theory that sexual harassment on the job is sex discrimination. *See, e.g.*, CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979).

17. MACKINNON, *supra* note 2, at 15.

18. *Id.* at 27.

19. *Id.* at 16.

This is perhaps the most controversial of MacKinnon's arguments.[20]

Nonetheless, when it found the Indianapolis anti-pornography ordinance unconstitutional, the court in *Hudnut* did not grapple with the question of whether pornography causes men to rape women.[21] The ordinance was held to unconstitutionally restrict materials based on the viewpoint expressed. "Under the First Amendment the government must leave to the people the evaluation of ideas. Bald or subtle, an idea is as powerful as the audience allows it to be."[22] The Indianapolis ordi-

---

20. In a review of *Only Words*, literary critic Carlin Romano notes that MacKinnon's critics ridicule her argument that pornography causes sexual violence as "junk science." Carlin Romano, *Between the Motion and the Act,* NATION, Nov. 15, 1993, at 563, 566. His own view of whether pornography causes men to enact violence is: "Probably true in some cases, but there's good reason to believe that pornographic materials, like prostitutes, also enable men to act in ways they don't or can't in their non-commercial intimate relationships, thus making porn a safety valve for male urges." *Id.* at 567.

Romano reinforces rather than refutes MacKinnon's argument. For him, pornographic materials and human prostitutes are reduced to an equivalency, both objects, both needed as "safety valves" for male urges. This is an implicit recognition that urges stimulated by pornography are dangerous. Yet Romano apparently sees no harm to an actual person if a prostitute is used as a safety valve. If it is acceptable for men to use real women who are prostitutes as "safety valves" for dangerous male urges, it seems clear that Romano believes that some women cannot be harmed. Perhaps he believes prostitutes are already degraded, so nothing can cause them moral harm. As to physical harm, perhaps he thinks prostitutes are accustomed to and paid to function as safety valves. But if prostitutes and pornographic materials are perceived by Romano as equivalent, then surely it is not so ridiculous for MacKinnon to argue that some men cannot distinguish between the women in pornography and other women. Moreover, he never addresses whether something perhaps should be done about the violence he admits is "probably" caused by pornography. *Id.*

21. The court made clear that speech may not be restricted based on the viewpoint expressed regardless of whether the materials function as harmful conduct. The court accepted the premise that pornography harms women.

> In saying that we accept the finding that pornography as the ordinance defines it leads to unhappy consequences, we mean only that there is evidence to this effect, that this evidence is consistent with much human experience, and that as judges we must accept the legislative resolution of such disputed empirical questions.

Hudnut, 771 F.2d at 329, n.2. The use of the euphemism "unhappy consequences" to refer to the harm it found may be an indicator of how serious the court really considers the harm to be.

22. *Id.* at 328. The opinion goes on to discuss other cases where the government was prevented from restricting speech on the basis of the viewpoint expressed (citing Brandenburg v. Ohio, 395 U.S. 444 (1969) (permitting propagation of the ideas of the Ku Klux Klan); DeJonge v. Oregon, 299 U.S. 353 (1937) (upholding right of Communists to speak freely and run for office); Lebron v. Washington Metropolitan Area Transit Authority, 749 F.2d 893 (D.C. Cir. 1984) (upholding right to criticize

nance, according to the court, restricted materials based on the viewpoint expressed about women's sexuality and also established an acceptable viewpoint.

> Speech that portrays women in positions of equality is lawful, no matter how graphic the sexual content. This is thought control. It establishes an 'approved' view of women, of how they may react to sexual encounters, of how the sexes may relate to each other. Those who espouse the approved view may use sexual images; those who do not, may not.[23]

Thus, the *Hudnut* court did not challenge MacKinnon's argument that pornography functions as conduct; the court simply considered the premise that pornography causes harm to be irrelevant. "If pornography is what pornography does, so is other speech."[24] Rather than state explicitly that harm caused by pornography does not matter, however, the court concluded that since pornography is powerful as speech, it is to be treated — and protected — as speech.[25] The opinion also cited earlier attempts to suppress speech because of the belief that the acceptance of the viewpoint expressed by the speech would lead to totalitarian government. These attempts were rejected as unconstitutional.[26]

In *Only Words*, MacKinnon responds to the reasoning in *Hudnut* by pointing out that the important distinction is not whether speech is also conduct but at what point the effect of speech which is also conduct begins to matter.

> I am not saying that pornography is conduct and therefore not speech, or that it does things and therefore says nothing and is

---

the President by misrepresenting his positions and to post the misrepresentations on public property); Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978) (upholding right of Nazi Party to march through a city with a large Jewish population)). *Id.* According to the court, these cases uphold the right to advocate the most despicable ideas. "They may do this because 'above all else, the First Amendment means that government has no power to restrict expression because of its message [or] its ideas. . .' " *Id.* (quoting Police Department v. Mosley, 408 U.S. 92, 95 (1972)).

23. *Id.*

24. *Id.* at 329.

25. *Id.*

26. The Alien and Sedition Acts passed during the administration of John Adams rested on a sincerely held belief that disrespect for the government leads to social collapse and revolution — a belief with support in the history of many nations. Most governments of the world act on this empirical regularity, suppressing critical speech. In the United States, however, the strength of the support for this belief is irrelevant.

Id.

> without meaning, or that all its harms are noncontent harms. In society, nothing is without meaning. Nothing has no content. Society is made of words, whose meanings the powerful control, or try to. At a certain point, when those who are hurt by them become real, some words are recognized as the acts that they are.[27]

MacKinnon wants the law to acknowledge the harm to women from pornography as real and to protect them from it.

MacKinnon points out that rape and murder are not protected expression although, like all actions, they express ideas.[28] Moreover, it is discriminatory intent, a mental state, that is required to prove an act of discrimination under the Fourteenth Amendment.[29] Thus, she argues, it is illogical for the court to assert that speech can never be restricted because of the viewpoint expressed. Speech is restricted when its function is discrimination.[30]

MacKinnon also argues that it is ludicrous to equate the power of the pornography industry with the power of those who advocate for the overthrow of the U.S. government, as was done in *Hudnut*. "Need it be said, women are not the government? Pornography has to be done to women to be made; no government has to be overthrown to make communist speech."[31] Here, MacKinnon is alluding to two kinds of harm to women. One is the harm to women whose abuse is filmed and then characterized as the pornographer's expression.[32] The other is the harm that stems from courts denying women protection from pornography by characterizing a woman's challenge to pornography as analogous to the government suppressing unpopular political view-

---

27. MACKINNON, *supra* note 2, at 29-30.

28. *Id.* at 30.

29. *Id.* at 30 (quoting Personnel Administrator v. Feeney, 442 U.S. 256 (1979); Washington v. Davis, 426 U.S. 229 (1976)).

30. MacKinnon points out that "the incoherence of distinguishing speech from conduct in the inequality context" is also apparent in R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992). MACKINNON *supra* note 2, at 33. *R.A.V.* is discussed *infra* part III.

31. MACKINNON, *supra* note 2, at 39.

32. To express eroticism is to engage in eroticism, meaning to perform a sex act. To say it is to do it, and to do it is to say it. It is also to do the harm of it and to exacerbate harms surrounding it. In this context, unrecognized by law, it is to practice sex inequality as well as to express it.

Id. at 33. Whether one agrees with this or not is likely to depend on whether or not one agrees that a particular erotic representation is one that is harmful to the woman presented, and that is where many people vehemently disagree.

points. That analogy turns the premise that women are powerful into a justification for denying women protection.

MacKinnon has previously challenged the traditional First Amendment principle that protection of all speech, including unorthodox expression, allows society to reach consensus on vital issues, free from government interference. She insists that pornography is not unorthodox expression but "the consensus."[33] In *Only Words*, she continues to articulate how pornography becomes the consensus:

> As society becomes saturated with pornography, what makes for sexual arousal, and the nature of sex itself in terms of the place of speech in it, change. What was words and pictures becomes, through masturbation, sex itself. As the industry expands, this becomes more and more the generic experience of sex, the woman in pornography becoming more and more the lived archetype for women's sexuality in men's, hence women's, experience.[34]

MacKinnon challenges not only the law, but the social fabric out of which legal opinions on pornography are crafted.

Here, MacKinnon's concern is that the way the law treats pornography, as exemplified by the *Hudnut* decision, affects the way society perceives women. That is, the law influences people not to care about the harm done to women by pornography when it does not acknowledge the harm to be significant. In this sense, the mere legal recognition of harm would improve the status of women in society by sending the signal that harm to women will not be tolerated.

2. Balancing Equality and Free Speech

In the last section[35] of *Only Words*, entitled "Equality and Speech," MacKinnon argues that more weight should be given to the constitutional right to equality when it is balanced against the harm caused by infringement of another's free speech right. The premise of MacKinnon's argument is that the focus on whether or not speech has been unacceptably infringed ignores the unequal power of those with and without the ability to express their views. She argues that there is a tension between the First and Fourteenth Amendments; the First Amendment has taken prece-

33. *See* MACKINNON, FEMINISM UNMODIFIED, *supra* note 5, at 130-31.

34. MACKINNON, *supra* note 2, at 25-26.

35. The second section of the book, *Racial and Sexual Harassment*, is discussed *infra* part IV.

dence over the Fourteenth, and we are mistaken to take for granted that it should.

MacKinnon develops this point by examining the reasoning behind *New York Times Co. v. Sullivan*.[36] In that case, the law of libel was first recognized as raising First Amendment issues.[37] *Sullivan* involved the publication of an advertisement in *The New York Times* attacking the racist acts of southern white police officers, who in turn sued *The New York Times* for libel. The Supreme Court, deciding in favor of the newspaper, held that in the interest of protecting the free speech of the press, a plaintiff would have to show that the publisher had actual malice when it printed false material.[38]

MacKinnon claims that although the issue was never addressed directly, the *Sullivan* decision benefitted from pro-equality sentiment, and she posits that the outcome may have been different if, for example, the advertisement had been published by racists about civil rights leaders.[39] MacKinnon notes that *Sullivan* undermined *Beauharnais v. Illinois*,[40] which had held group defamation unprotected by the First Amendment.[41] MacKinnon

---

36. 376 U.S. 254 (1964).

37. MACKINNON, *supra* note 2, at 78.

38. *Sullivan*, 376 U.S. at 279-80. For commentary on *Sullivan*, *see generally* ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT (1992); Fred D. Gray, *The* Sullivan *Case: A Direct Product of the Civil Rights Movement*, 42 CASE W. RES. L. REV. 1223 (1992); Kermit L. Hall, *Justice Brennan and Cultural History:* New York Times v. Sullivan *and Its Times*, 27 CAL. W. L. REV. 339 (1990-91); Sheldon W. Halpern, *Of Libel, Language, and Law:* New York Times v. Sullivan *at Twenty-Five*, 68 N.C. L. REV. 273 (1990).

39. MACKINNON, *supra* note 2, at 79. As MacKinnon explains:

> In reality, *Sullivan* was animated by issues of substantive equality as powerful as they were submerged; indeed, they were perceptible only in the facts. The case lined up an equality interest — that of the civil rights activists in the content of the ad — *with* the First Amendment interest of the newspaper. This aligned sentiment in favor of racial equality with holding libel law to standards of speech protection higher than state law would likely enforce on racists. In other words, *Sullivan* used support for civil rights to make it easier for newspapers to publish defamatory falsehoods without being sued.

40. 343 U.S. 250 (1952).

41. Joseph Beauharnais was convicted of criminal libel under an Illinois statute which prohibited the publication of materials portraying "depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots." *Id.* at 251 (quoting § 224a of the Illinois Criminal Code, ILL. REV. STAT. ch. 38, Div. 1, § 471 (1949)). Beauharnais had distributed petitions to the Mayor and City Council of Chicago asking them "to halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and per-

laments the demise of *Beauharnais* because she notes that although the opinion did not mention equality, its effect had been to protect equality rights under the Fourteenth Amendment.[42] Had *Beauharnais* not been undermined by *Sullivan*, she suggests, it could be used to justify a law designed to protect women's equality, such as her proposed antipornography legislation.

The crux of MacKinnon's argument is that "pornography ordinances and hate crime provisions fail constitutional scrutiny that they might, with constitutional equality support, survive."[43] The recognition of a harm to someone's equality right would put more weight onto the scale that is balanced against another's speech right. Courts would be forced to look at the effect of the speech on others, and the impact on someone's equality would have to matter. Instead, *Sullivan* made it easier for the media to publish false and damaging statements about groups as well as public figures.

MacKinnon contends that, in reality, a power imbalance exists between those with and without access to media for speech, which is obscured when courts look only at whether one party has the right to express an idea. She points out that equality is never addressed when pornography is considered under the obscenity doctrine.[44] The requirement that materials offend community standards before they can be restricted prevents an evaluation of the harms perpetuated by the materials which help

---

sons, by the Negro" through "rapes, robberies, knives, guns and marijuana." *Id.* at 252.

Justice Frankfurter, writing for the majority, reasoned that if such statements were punishable as libel when made against an individual, they were punishable when directed at a group:

> But if an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a State power to punish the same utterance directed at a defined group, unless we can say that this is a wilful and purposeless restriction unrelated to the peace and well-being of the State.

Id. at 258.

42. MACKINNON, *supra* note 2, at 84-85.

43. *Id.* at 85.

44. Under the Supreme Court's obscenity doctrine, material falls outside of First Amendment protection if the " 'average person, applying contemporary community standards,' would find that the work, taken as a whole, appeals to the prurient interest," if the work "depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law," and if the work, "taken as a whole, lacks serious literary, artistic, political, or scientific value." Miller v. California, 413 U.S. 15, 24 (1973) (citing Kois v. Wisconsin, 408 U.S. 229, 230 (1972) (quoting Roth v. United States, 354 U.S. 476, 489 (1957))).

establish those very standards. In MacKinnon's words: "inequality is allowed to set community standards for the treatment of women."[45]

To illustrate this point, MacKinnon returns to the *Hudnut* decision. The ordinance was found unconstitutional because it restricted speech on the basis of the point of view expressed.[46] MacKinnon argues that Judge Easterbrook treated the ordinance "as if it were a group defamation law, holding that no amount of harm of discrimination can outweigh the speech interest of bigots, so long as they say something while doing it."[47] MacKinnon counters that if the Fourteenth Amendment had been weighed in the balance, the ordinance would have been upheld. "A showing of discriminatory intent is required under the Fourteenth Amendment. Now we are told that this same motive, this same participation in a context of meaning, this same hatred and bigotry, these same purposes and thoughts, presumably this same intent, *protects* this same activity under the First Amendment."[48] MacKinnon identifies this as a fundamental inconsistency that should be resolved in favor of equality.

This argument has ramifications for much more than the law's treatment of pornography:

> If speech were seen through an equality lens, nude dancing regulations might be tailored to ending the sex inequality of prostitution, at the same time undermining the social credibility of the pimp's lie that public sex is how women express themselves. Crossburning prohibitions would be seen as the civil rights protections that they are. Women might be seen to have a sex equality right to the speech of abortion counseling. Poverty might even be seen as the inequality underlying street begging, at once supporting the speech interest in such solicitations and suggesting that equal access to speech might begin before all one can say is 'spare change?'[49]

In other words, government would place more emphasis on protecting freedom than on protecting expression that restricts freedom.

45. MACKINNON, *supra* note 2, at 88.
46. *Hudnut*, 771 F.2d at 332.
47. MACKINNON, *supra* note 2, at 93.
48. *Id.* at 94-95.
49. *Id.* at 85-86 (footnotes omitted).

B. *Strossen's Position: Pornography is Protected Expression*

To Strossen, pornography is simply sexual expression and therefore, as expression, it is entitled to First Amendment protection. She rejects the argument that pornography is harmful to women.[50] Instead, she is concerned that if the law restricts sexual expression in the name of protecting women, the existence of such law would convey the impression that women need to be protected from sex, which has historically meant a limitation of women's sexual choices. Such restriction of sexual expression would lead to the further restriction of women's rights in general.[51]

1. Sex Panic

In *Defending Pornography*, Strossen begins with an overview of the current "sex panic" taking place across the country, fomented by antipornography feminists as well as right-wing conservatives.[52] She argues that since MacKinnon and other "procensorship" feminists believe "that sex and materials that depict or describe it inevitably degrade and endanger women," they therefore are "aptly labeled 'antisex.' "[53] She later observes without comment that because anticensorship feminists do not

50. According to Strossen, "The most comprehensive recent review of the social science data . . . . concludes that no credible evidence substantiates a clear causal connection between any type of sexually explicit material and any sexist or violent behavior." STROSSEN, *supra* note 3, at 250-51 (citing MARCIA PALLY, SEX AND SENSIBILITY: REFLECTIONS ON FORBIDDEN MIRRORS AND THE WILL TO CENSOR (1994)).

Even if one accepts the premise that it is possible for social science data to capture such certainty about complex human behavior, Pally's conclusion — and Strossen's reliance on it — begs the question of whether action should be taken on the basis of anything less than "a clear causal connection."

51. *Id.* at 14-15.

52. As Strossen states:

> We are in the midst of a full-fledged "sex panic," in which seemingly all descriptions and depictions of human sexuality are becoming embattled. Right-wing senators have attacked National Endowment for the Arts grants for art whose sexual themes — such as homoeroticism or feminism — are allegedly inconsistent with "traditional family values." At the opposite end of the political spectrum, students and faculty have attacked myriad words and images on campus as purportedly constituting sexual harassment. Any expression about sex is now seen as especially dangerous, and hence is especially endangered. The pornophobic feminists have played a very significant role in fomenting this sex panic, especially among liberals and on campuses across the country.

Id. at 20.

53. *Id.*

believe that sex is degrading to women, they are often called "prosex."[54]

The current "sex panic" that Strossen identifies and attributes to the influence of MacKinnon and Dworkin includes the recent controversy over the funding of controversial artists by the National Endowment for the Arts (NEA),[55] as well as controversial sexual harassment and hate speech policies on college campuses across the country.[56] Strossen argues that women's status as human beings need not be pitted against their sexuality.[57] This is a key concern for Strossen and apparently reflects her motivation for writing the book.

2. Pornography Is Not Harmful to Models

Strossen counters MacKinnon's assertion that pornography is harmful conduct in the form of abuse of pornography models by asserting that working conditions for sex industry workers are less dangerous than those of women who labor in mills and on assembly lines:

> By some estimates, more than ten thousand workers die each year, or about thirty per day, from on-the-job injuries; about seventy thousand more workers are permanently disabled annually. According to the National Institute for Occupational Safety and Health, one in five poultry workers, who are mostly women, have been seriously injured in the hands, wrists, or

54. *Id.* at 34. It is perhaps indicative of the great extent to which Strossen considers the antipornography feminists a threat to free expression that she chooses to adopt rather than challenge the use of such reductive terms.

55. For a discussion of the NEA controversy, see Jodi Cantor, *The National Endowment of the Arts Controversial Obscenity Regulation and its Constitutional Ramifications*, 3 ST. THOMAS L.F. 131 (1991); Owen M. Fiss, Comment, *State Activism and State Censorship*, 100 YALE L.J. 2087 (1991); Donald W. Hawthorne, *Subversive Subsidization: How NEA Art Funding Abridges Private Speech*, 40 KAN. L. REV. 437 (1992); Stephen F. Rohde, *Art of the State: Congressional Censorship of the National Endowment for the Arts*, 12 HASTINGS COMM. & ENT. L.J. 353 (1990); Carl F. Stychin, *Identities, Sexualities, and the Postmodern Subject: An Analysis of Artistic Funding by the National Endowment for the Arts*, 12 CARDOZO ARTS & ENT. L.J. 79 (1994); Nancy Ravitz, Note, *A Proposal to Curb Congressional Interference with the National Endowment for the Arts*, 9 CARDOZO ARTS & ENT. L.J. 475 (1991).

56. One example cited by Strossen is the sexual harassment code instituted by Syracuse University, which prohibited behavior which "focus[es] on men and women's sexuality, rather than on their contributions as students or employees in the University." STROSSEN, *supra* note 3, at 24 (citing Syracuse University, *Responding to Sexual Harassment at Syracuse University*, Oct. 8, 1993, at 1).

57. *Id.* at 24.

> shoulders. And job-related illnesses and crippling injuries are on the rise throughout the workforce.[58]

Strossen does not argue that nothing should be done to protect women from sexual violence perpetrated in or through the pornography industry. However, she maintains that the appropriate solution is not to eliminate it, but, as with other industries, to regulate to ensure worker safety. Strossen quotes Judge Richard Posner[59] for the proposition that because of inevitable economic forces, pornography would simply be driven underground if it were made illegal:

> If the sex industries were treated as legitimate businesses, they would be subject to a whole range of laws that would enhance the lives of the women who work in them. Conversely, if pornography were made illegal, the women who performed for pornographic materials would have no protection under a panoply of measures that can promote their welfare, including laws prohibiting coercion or duress, sanitation codes, wage and hour laws, the social security system, insurance and pension laws, laws protecting safety and health, and laws guaranteeing collective bargaining rights.[60]

Thus, for Strossen, safety regulations, not censorship, would protect women in the sex trade.

In an additional challenge to the antipornography feminist position that models are coerced to participate in pornography, Strossen attacks an example she maintains is often used to prove coercion: Linda Marchiano's contention that she was physically coerced to perform in the movie *Deep Throat*.[61] Strossen argues that rather than being raped, beaten and forced to take part in

---

58. *Id.* at 191 (citing Richard Lacayo, *Accidents: A Death on the Shop Floor*, TIME, Sept. 16, 1991, at 28).

59. Strossen's use of Richard Posner as authority is an unusual choice for a feminist, given the widespread criticism of Posner's 1992 book *Sex and Reason* by many feminists. *See, e.g.*, Katharine T. Bartlett, *Rumpelstiltskin*, 25 CONN. L. REV. 473 (1993); Martha A. Fineman, *The Hermeneutics of Reason: A Commentary on Sex and Reason*, 25 CONN. L. REV. 503 (1993); Gillian K. Hadfield, *Flirting with Science: Richard Posner on the Bioeconomics of Sexual Man*, 106 HARV. L. REV. 479 (1992) (book review); Gillian K. Hadfield, *Not the "Radical" Feminist Critique of* Sex and Reason, 25 CONN. L. REV. 533 (1993); Ruthann Robson, *Posner's Lesbians: Neither Sexy Nor Reasonable*, 25 CONN. L. REV. 491 (1993). For Posner's response to this criticism, see Richard A. Posner, *The Radical Feminist Critique of Sex and Reason*, 25 CONN. L. REV. 515 (1993).

60. STROSSEN, *supra* note 3, at 192 (citing Richard A. Posner, *Obsession*, NEW REPUBLIC, Oct. 18, 1993, at 34) (reviewing CATHARINE A. MACKINNON, ONLY WORDS (1993)). Strossen makes no distinction between making pornography "illegal" and the creation of a civil cause of action for harms caused by pornography.

61. *Id.* at 182, 183 (citing Leora Tanenbaum, *The Politics of Porn: Forced Arguments*, IN THESE TIMES, Mar. 7, 1994, at 17-20).

the movie by the pornography industry, Marchiano was in fact victimized by her husband, Chuck Traynor, "who had no other connection to the pornography business."[62]

Strossen also notes that in her book *Ordeal*,[63] Marchiano reported enjoying the first day of shooting *Deep Throat* and stated that no one had asked her to do anything she did not want to do.[64] However, that enjoyment enraged her husband and led to his abuse of her. Moreover, Strossen notes that in her 1986 book, *Out of Bondage*,[65] Marchiano wrote that subsequent to *Deep Throat* she received some lucrative film offers and added, "[I]f I acted in a dirty movie, I would be doing it out of need and greed. . . . I had a choice."[66] And if this were not evidence enough of the insignificance of Marchiano's story of coercion, Strossen adds that the story is really only anecdotal evidence, only one woman's story, which should not be accepted as representative of all women participating in pornography.[67]

3. Women's Capacity for Consent

Strossen maintains that women who participate in the production of pornography are consenting to do so. Yet, apparently what Strossen finds most threatening about the feminist anti-

---

62. *Id.* at 183. Strossen's emphasis on Marchiano's husband as the perpetrator of her abuse is revealing as to the different forms that domestic violence can take. However, Traynor's role does not absolve the industry from responsibility for Marchiano's injuries. The industry provided the market, and other players (producers, marketers, distributors, theater owners) profited from the abuse. According to Andrew Ross, *Deep Throat* was made for $25,000 and earned over $50 million, through organized crime distribution. ANDREW ROSS, NO RESPECT: INTELLECTUALS AND POPULAR CULTURE 173 (1989).

63. Marchiano uses the stage name "Linda Lovelace" in her books and films. LINDA LOVELACE & MIKE MCGRADY, ORDEAL (1980).

64. STROSSEN, *supra* note 3, at 183 (citing Tanenbaum, *supra* note 61, at 19).

65. LINDA LOVELACE, OUT OF BONDAGE (1986).

66. STROSSEN, *supra* note 3, at 183 (quoting Dan Greenberg & Thomas H. Tobiason, *The New Legal Puritanism of Catharine MacKinnon*, 54 OHIO ST. L.J. 1375, 1402-03 (1993)).

67. Strossen concludes:

> Therefore, even assuming for the sake of argument — directly contrary to what she herself has written — that Marchiano had been abused by members of the pornography industry, that still would provide no basis for concluding that other sex industry workers also suffered such abuse. Nor does the fact that Marchiano's then-husband forced her to perform in *Deep Throat* support the contention that other pornography models or actresses are also performing under duress.

Id. at 184.

pornography movement is her belief that it suggests that no woman can consent to pornography:

> [A]nticensorship feminists reject the view of their procensorship counterparts that women who pose for sexual images are always and inevitably victims of coercion. Worse yet, the procensorship feminists' view that women cannot consent to pose for sexual pictures or films is antithetical to women's full and equal citizenship, relegating women to the subordinated legal status of children.[68]

Here, Strossen is concerned with what the restriction of a woman's choice to participate says about a woman's ability to make choices concerning sex and work.

Moreover, to Strossen, when MacKinnon questions First Amendment doctrine and asserts that its protection of pornography silences women, MacKinnon is implicitly arguing that women are incapable of countering offensive speech with more speech: "Ironically, the feminist procensorship faction apparently does not view women as capable of such self-help, but instead sees us as helpless."[69] In this argument, Strossen is objecting not only to the restriction of options available to individual women, but to the effect of such restriction on how society perceives women.

Strossen specifically takes issue with the provision in the antipornography ordinance proposed by MacKinnon and Andrea Dworkin which provides that coercion cannot be disproved with the following kinds of evidence:

> [T]hat the [allegedly coerced] person actually consented to a use of the performance that is changed into pornography; or . . . that the person knew that the purpose of the acts or events in question was to make pornography; or . . . that the person showed no resistance or appeared to cooperate actively in the photographic sessions or in the sexual events that produced pornography; or . . . that the person signed a contract, or made statements affirming a willingness to cooperate in the production of pornography; or . . . that no physical force, threats, or weapons were used in the making of the pornography; or . . . that the person was paid or otherwise compensated.[70]

---

68. *Id.* at 180.

69. *Id.* at 48.

70. *Id.* at 181. The Model Antipornography Law drafted by MacKinnon and Dworkin can be found in Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN'S L.J. 1, 24 (1985). The Seventh Circuit cited the following evidence excluded by the Indianapolis ordinance as capable of constituting valid proof of consent:

Strossen's specific objection to the provision is that it denies women freedom of choice and presumes that women are incapable of exercising freedom of choice.[71]

4. Pornography Restriction Would Undermine Individual Moral Responsibility

Strossen offers another reason for rejecting the anti-pornography movement: it lets perpetrators of sexual violence off the hook. "In arguing that exposure to pornography causes violent crimes against women, procensorship feminists dilute the accountability of men who commit these crimes by displacing some of it onto words and images, or onto those who create or distribute them."[72] The solution, which Strossen notes the ACLU has advocated, is to "focus on the individual men who actually use violence or duress against women."[73] For Strossen, blaming pornography instead of individuals may seem simple, but is undoubtedly the wrong way to address the problem of sexual violence.

Again, Strossen's concern is with what the antipornography movement's position implies about individual moral freedom. "By ascribing to any sexually oriented work one meaning only, and by imposing that construct on the rest of us, the feminist antipornography movement is profoundly antithetical to individualism, denying autonomy both to all the people who create expressive works and to all the people who see their works."[74] Thus, Strossen is objecting to the adverse impact anti-pornography legislation would have on both women and men by undermining individualism and autonomy.

> The ordinance specifies that proof of any of the following "shall not constitute a defense: I. That the person is a woman; . . . VI. That the person has previously posed for sexually explicit pictures . . . with anyone . . .; . . . VII. That the person actually consented to a use of the performance that is changed into pornography; . . . IX. That the person knew that the purpose of the acts or events in question was to make pornography; . . . XI. That the person signed a contract, or made statements affirming a willingness to cooperate in the production of pornography; XII. That no physical force, threats, or weapons were used in the making of the pornography; or XIII. That the person was paid or otherwise compensated."

American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 325 (7th Cir. 1985) (quoting § 16-3(g)(5) of the Indianapolis Code).

71. STROSSEN, *supra* note 3, at 181.

72. *Id.* at 268.

73. *Id.*

74. *Id.* at 145.

5. Why Antipornography Legislation Is Unconstitutional

Strossen asserts that the Dworkin-MacKinnon antipornography law would undermine "two cardinal principles" of free speech jurisprudence: the principle of viewpoint neutrality and the requirement that speech pose a clear and present danger before it can be restricted. Like the *Hudnut* court, Strossen insists that the Constitution forbids the restriction of speech based on the viewpoint expressed.

> In recent years, the Court has steadfastly enforced this fundamental principle to protect speech that conveys ideas that are deeply unpopular with or offensive to many, if not most, Americans: for example, burning an American flag in a political demonstration against national policies, and burning a cross near the home of an African-American family that had recently moved into a previously all-white neighborhood.[75]

Strossen's only comment on *R.A.V.*, the latter case, is to point out in a footnote that the Court had recognized that the cross-burning could have been prohibited under arson, vandalism or trespass laws.[76] For Strossen, the principle of viewpoint-neutrality upheld in *R.A.V.* underscores the First Amendment philosophy that the response to offensive speech should be more speech. "Persuasion, not coercion, is the solution."[77]

According to Strossen, the antipornography approach also violates the second cardinal First Amendment principle that speech not be restricted unless it poses a "clear and present danger."[78] Strossen notes that under this principle, there are "two essential prerequisites for restriction: that the expression will cause direct, imminent harm to a very important interest, and that only by suppressing it can we avert such harm."[79] Strossen approvingly quotes from Judge Frank Easterbrook's opinion in *Hudnut*, where he addressed MacKinnon's argument that pornography is what it does by pointing to all kinds of ugly expres-

---

75. *Id.* at 41 (citing Texas v. Johnson, 491 U.S. 397, 414 (1989); U.S. v. Eichman, 496 U.S. 310 (1990) (flag burning); R.A.V. v. City of St. Paul, 112 S.Ct. 2538 (1992) (cross burning)).

76. Strossen's position with respect to *R.A.V.* is discussed more fully *infra* part III.

77. STROSSEN, *supra* note 3, at 41.

78. *Id.* at 41-42 (quoting Schenck v. United States, 249 U.S. 47, 52 (1919)). In the passage to which Strossen refers, Justice Oliver Wendell Holmes wrote, "The question in every case is whether the words used 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." *Schenck*, 249 U.S. at 52.

79. *Id.* at 42.

sion that may influence people but is nonetheless protected and concluded, "[i]f the fact that speech plays a role in a process of conditioning were enough to permit governmental regulation, that would be the end of freedom of speech."[80] Thus, Strossen supports the doctrine that any time speech is restricted based on viewpoint, even if that speech would otherwise be unprotected expression, the First Amendment is violated.

One area of First Amendment law where Strossen and MacKinnon are in agreement is that the obscenity doctrine does not protect women.[81] Nevertheless, Strossen disagrees that antipornography legislation is a better alternative. She argues that aside from suppressing expression because of its viewpoint, the antipornography ordinance differs from the obscenity doctrine in two ways that make it "even more plainly inconsistent with First Amendment values."[82] First, sexually explicit material that is subordinating would be subject to a cause of action no matter how significant its overall, literary, artistic, or other value.[83] Second, works would not be considered "as a whole." Here Strossen quotes MacKinnon's famous phrase, "If a woman is subjected, why should it matter that the work has other value."[84] Strossen characterizes that view as reverting "to an archaic nineteenth-century obscenity definition that twentieth-century courts have emphatically rejected."[85] She finds no merit in MacKinnon's insistence on pointing out misogyny even in "high art." Apparently for Strossen it matters a great deal if the work has other value. This position likely stems from her belief that the same work would not actually cause any harm.

Strossen rejects the idea that a civil cause of action for women harmed by pornography is different from censorship because it involves no government prevention of publication.[86] She

80. *Id.* at 43 (citing American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 329-30 (7th Cir. 1985)).

81. Strossen considers the obscenity doctrine so vague that judges should not be trusted with evaluating sexual expression. "In reality, the obscenity definition functions more as a Rorschach test for judges and jurors than as an objective legal standard for protecting sexual speech against unwarranted prosecutions or convictions." *Id.* at 54. MacKinnon has similarly criticized the obscenity doctrine. *See* MACKINNON, FEMINISM UNMODIFIED, *supra* note 5, at 146-62.

82. STROSSEN, *supra* note 3, at 62.

83. *Id.* at 63.

84. *Id.* (citing MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 5, at 202).

85. *Id.*

86. *Id.* at 64-65.

notes that the Supreme Court has recognized that fear of damage awards in civil lawsuits "may be markedly more inhibiting . . . than the fear of prosecution under a criminal statute."[87] Thus, for Strossen, the distinction between private persuasion that is constitutionally protected and unconstitutional "speech-retarding lawsuits" which could be brought under antipornography legislation turns on the role of government. Speech should only be countered with more speech, not restricted by the government.

> *Private persuasion and counterpersuasion* embody and promote essential human rights values, whereas *governmental coercion* is antithetical to them. This fundamental distinction is recognized even by anticensorship feminists who are critical of pornography — indeed, even by those who believe that pornography may encourage misogynistic discrimination or violence.[88]

Governmental coercion, to Strossen, includes any use of government authority, including the exercise of the judicial system to settle civil disputes.

In Strossen's view, there really is no compelling need to balance the Fourteenth Amendment against the First Amendment in the regulation of sexual expression because women's equality rights are more effectively advanced by targeting legal reform directly at what she characterizes as the "real causes" of sexual violence and discrimination.[89] She argues that the pornography debate diverts attention from the real causes of sexual violence and discrimination:

> sex-segregated labor markets; systematic devaluation of work traditionally done by women; sexist concepts of marriage and family; inadequate income-maintenance programs for women unable to find wage work; lack of day care services and the premise that child care is an exclusively or largely female responsibility; barriers to reproductive freedom; and discrimination and segregation in education.[90]

To Strossen, free speech need not and should not be sacrificed in the fight against these real causes of sexual violence and discrimination.

87. *Id.* at 65-66 (citing New York Times v. Sullivan, 376 U.S. 254, 277 (1964)).
88. *Id.* at 66.
89. *Id.* at 266.
90. *Id.* at 267 (citing Hunter & Law, *supra* note 1, at 134-35).

II. THE DRAWBACKS OF FREE SPEECH ABSOLUTISM

Strossen makes a valuable contribution to the pornography debate by making a dramatic statement of feminist opposition to restrictions of sexual expression. However, her book is limited by her insistence that the antipornography feminists, MacKinnon in particular, are primarily responsible for the "sex panic" she discusses. As such, she neglects to address the extent to which the assaults on freedom of expression she describes may have been caused by the conservative backlash against "multiculturalism" and "political correctness" and its concurrent stress on reinvigorating "family values."[91] Indeed, there is widespread disagreement today over the boundaries of free speech; such debates are not just among feminists.[92] This section of the Essay addresses some areas where Strossen's commitment to free speech absolutism undermines her analysis.

A. *The Effects of Legal Restrictions of Pornography*

The argument that legal restriction of pornography would only drive it underground has merit, and Strossen is not the only commentator with this view. For example, Carol Smart has cautioned that feminists must expand their concern to include Third World women and not assume that laws restricting the availabil-

---

91. *See generally* SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN (1991) (documenting the myriad incarnations of the backlash against women's rights in representations of women in popular psychology, entertainment, and fashion magazines and in the areas of employment, education, politics, and reproduction).

For an excellent exploration of the motivation behind the attacks on "political correctness" from the left and the right, see Richard Goldstein, *The Politics of Political Correctness*, VILLAGE VOICE, June 18, 1991, at 39. Discussing changing alignments in American politics, he writes:

> What is currently referred to as "the gender gap" may actually signal the emergence of a white male voting bloc, as an inevitable reaction to the autonomy of women, gays, and people of color. This is a powerful force, and its claim to reason and rectitude is made with all the authority men are so skillful at mustering. Yet underlying its morality of freedom and individuality is terror of a world where endlessly changing affinities and alliances determine social reality — not a simple consensus among dudes.

Id. at 41.

92. For a cogent summary of the differences between past and current challenges to First Amendment protection of speech alleged to be harmful, see Kathleen M. Sullivan, Lecture, *Free Speech Wars*, 48 SMU L. REV. 203, 213 (1994) ("The new speech regulators demand a response from those who would leave speech mostly deregulated; and they deserve a response that goes beyond the rote and reflexive invocation of free speech as an article of faith.").

ity of pornography would alleviate exploitation of *all* women: "On the contrary it might make matters worse for women who work in the skin trade because the conditions of the production of pornography might worsen, or the whole enterprise might move to the Third World where safeguards on women's labour are far less extensive."[93] Likewise, Strossen is persuasive in arguing that we cannot assume that the enactment of legal measures would automatically solve the problem of sexual violence. However, Strossen's position, which relies on Richard Posner's economic argument, contains a significant gap: we are told how much better things would be for sex workers if the sex industries were treated as legitimate businesses and we are told how much worse it would be if the industries were made illegal, but we are told nothing about the extent to which women now working in the sex industries take advantage of any law. Presumably, to Posner and Strossen, a lack of information to report would most likely indicate there is no harm being done; this inference leads them to the conclusion that the law does not need to be changed. To MacKinnon, a lack of information on sex workers seeking legal protection would indicate that women being harmed are also being silenced; this leads her to the conclusion that a great deal needs to be changed.

Of course, enacting health and safety regulations specific to the sex industries would create another problem — it would legitimize commercial sex, an activity that many people consider inherently demeaning.[94] It is important to identify this view as

---

93. CAROL SMART, FEMINISM AND THE POWER OF LAW 133 (1989).

94. One way to think about the effects of regulation of pornography on our culture would be to compare it to another activity cherished by some and abhorred by others: boxing. Novelist Joyce Carol Oates, who is also a boxing fan, has analyzed boxing and observes that boxing as a "public spectacle" is akin to pornography:

> [I]n each case the spectator is made a voyeur, distanced, yet presumably intimately involved, in an event that is not supposed to be happening as it is happening. The pornographic "drama," though as fraudulent as professional wrestling, makes a claim for being about something absolutely serious, if not humanly profound: it is not so much about itself as about the violation of a taboo. That the taboo is spiritual rather than physical, or sexual — that our most valuable human experience, love, is being desecrated, parodied, mocked — is surely at the core of our culture's fascination with pornography. In another culture, undefined by spiritual-emotional values, pornography could not exist, for who would pay to see it?

JOYCE CAROL OATES, ON BOXING 105-06 (1987). For Oates, the important difference between the two activities is that boxing is not theatrical, but real.

The debate over whether boxing should be banned or more heavily regulated also shares with pornography a conflation of the issues of whether changes should be

an expression of a moral value and to stress, as Strossen does, that not all women share that view. However, it does not follow that because antipornography legislation might be enacted primarily to appease people who find commercial sex morally offensive, such legislation would not also actually help women. Ensuring the health and safety of women in the sex trade should be the main focus, and that requires listening to both those who report abuse and those who maintain they enjoy their work.

B. *Women's Capacity to Consent*

Strossen is persuasive in arguing that by excluding just about every possible way for a defendant to prove consent, the MacKinnon-Dworkin ordinance makes an implicit statement that it is not possible for a woman to consent to participating in pornography. However, the statement need not be interpreted as a statement that women lack moral capacity to consent; it can also be

---

made for the sake of the boxers or for the sake of the people who are corrupted by watching it. Oates points out that the presence of the referee in the boxing ring, ostensibly to ensure safety, takes away our collective sense of responsibility for what happens in the ring.

> But so central to the drama of boxing is the referee that the spectacle of two men fighting each other unsupervised in an elevated ring would seem hellish, if not obscene — life rather than art. The referee makes boxing possible.
>
> The referee is our intermediary in the fight. He is our moral conscience extracted from us as spectators so that, for the duration of the fight, 'conscience' need not be a factor in our experience; nor need it be a factor in the boxers' behavior.

Id. at 47. For anyone who opposes boxing, this observation is proof that regulation can never reform it; the activity is inherently dehumanizing.

Interestingly, the debate over what should be done about boxing almost never includes anyone arguing that to take away the opportunity for men to box would suggest that men (as a group) are morally incapable of consent, although there might be arguments that it would be unfair to young men desperate for a way out of the ghetto. Oates comments on the economic forces that lead men, today almost exclusively African-American and Latino men, to boxing.

> The relationship between boxing and poverty is acknowledged, but no one suggests that poverty be abolished as the most practical means of abolishing boxing. So frequently do young boxers claim they are in greater danger on the street than in the ring that one has to assume they are not exaggerating for the sake of credulous white reporters.

Id. at 94.

Clearly, the relevance of all this to pornography will depend enormously on whether one believes that the action portrayed in pornography is theatrical or real. However, the possibility that any of the violent pornography is real places an equally enormous burden on us to honestly address the impact of debates about moral issues that take place on a symbolic level while having profound impact on the real lives of persons who perform our public rituals.

interpreted as a deduction based on the choices available to women. Put more generally, identifying obstacles to the exercise of women's choices is not necessarily the equivalent of concluding that women are incapable of exercising the choices they might face if the obstacles were removed.[95]

One of the difficulties with this issue is that it is not often easy to determine whether women participate in the sex industry because they are coerced, because they freely choose to or, which is more likely, because of a complex combination of the two. Elizabeth M. Schneider has written about the need for feminism to move beyond the characterization of women as either victims or agents.[96] She argues that "victimization and agency are not extremes in opposition; they are interrelated dimensions of women's experience."[97] Schneider's recommendation is as follows:

> I urge a more textured and contextual analysis of the interrelationship between women's oppression and acts of resistance in a wider range of women's circumstances. We must seek to understand both the social context of women's oppression, which shapes women's choices and constrains women's agency and resistance, and also recognize women's agency and resistance in a more nuanced way.[98]

95. It may be a realistic fear that because of widely held stereotypes, many people will make the inference that if women need protection from the pornography industry, it must be because they are morally helpless, and as a consequence, women will experience more discrimination. The recent Supreme Court ruling in Harris v. Forklift Systems, Inc., 114 S. Ct. 367 (1993), which held that a plaintiff alleging sexual harassment need not prove psychological harm, but only that the abuse created a hostile work environment, may help to dispel the notion that when a woman objects to being harmed she is portraying herself as a victim.

96. Elizabeth M. Schneider, *Feminism and the False Dichotomy of Victimization and Agency*, 38 N.Y.L. SCH. L. REV. 387 (1993).

97. *Id.* at 395.

98. *Id.* at 397.

This is an important point,[99] and it is worth adding that such analysis can be difficult.[100]

Dorothy E. Roberts has written about the pitfalls of attributing motives to persons who act in the context of systems of oppression.[101] Discussing her own work on the prosecution of poor Black women who use drugs during pregnancy, Roberts clarifies the difference between discussing external causes of oppression and individual acts characterized as "deviant."

> The complexity of distinguishing between resistance and accommodation, between what merely reproduces the status quo and what subverts it, points out an extra danger in undertaking this scholarly pursuit. Writing about resistance risks supporting the powers that be by valorizing behaviors that in reality perpetuate oppression. It is much safer to deconstruct - to identify the racist, patriarchal, elitist, and homophobic features of dominant culture — and to seek, with conviction, to eradicate them.[102]

She notes that it is easy to characterize prosecution of such pregnant women as racist, but it is much more difficult to assess whether the mothers' behavior can be characterized as acts of resistance.[103]

---

99. Robin West has similarly argued persuasively that both liberal and radical feminists need to focus on a woman's subjective happiness when exploring issues of consent.

> Thus, I will argue that *liberal-legal* feminist theorists — true to their liberalism — want women to have more choices, and that *radical-legal* feminist theorists — true to their radicalism — want women to have more power. Both models direct our critical attention *outward* — liberalism to the number of choices we have, radicalism to the amount of power. Neither model of legal criticism, and therefore, derivatively, of feminist legal criticism, posits subjective happiness as the direct goal of legal reform, or subjective suffering as the direct evil to be eradicated.

Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 87 (1987).

100. Examples of promising efforts along these lines cited by Schneider include Kathryn Abrams, *Ideology and Women's Choices*, 24 GA. L. REV. 761 (1990); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Martha R. Mahoney, *Exit: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings*, 65 S. CAL. L. REV. 1283 (1992); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991); Martha R. Mahoney, *Whiteness and Women, In Practice and Theory: A Reply to Catharine MacKinnon*, 5 YALE J.L. & FEMINISM 217 (1993); Dorothy E. Roberts, *Deviance, Resistance, and Love*, 1994 UTAH L. REV. 179 (1994) [hereinafter Roberts, *Deviance*]; and Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality and the Right of Privacy*, 104 HARVARD L. REV. 1419 (1991).

101. Roberts, *Deviance*, *supra* note 100.

102. *Id.* at 186-87.

103. *Id.*

Roberts' insight can be applied to the question of whether pornography models are coerced or whether they freely choose their profession. By analogy, it is important but perhaps easier to criticize the male-dominated sex industry, as MacKinnon does, than to assess the complex and varying motivations of women who work in it. Strossen's attempt to move away from the portrayal of sex workers as simply victims or social deviants is equally important, and also more challenging. In doing so, however, she over-emphasizes women's agency.[104]

Strossen makes a valid point that Linda Marchiano's story *alone* does not prove coercion in the pornography industry. However, it is one thing to make the argument that Marchiano's story is anecdotal and therefore does not mean that all women are coerced; it is another to attempt to disprove the claim that all women are coerced by proving that Marchiano was not coerced. By characterizing Marchiano's problems as a purely domestic matter,[105] Strossen denies they represent an industry-wide problem, implying that a woman abused in the sex industry has only herself to blame.

To argue that the Marchiano story either proves coercion in the industry or proves that pornography models freely consent to their work is to ignore the profound ambivalence that Marchiano must have felt throughout what she at first enjoyed but later came to characterize as an "ordeal." To really address the problem of sexual violence, feminists must grapple with such ambivalence, not deny it. Only then can we formulate a new approach

---

104. MacKinnon's work has been criticized as being overly generalized and for claiming to represent the situations of all women. *See, e.g.*, Harris, *supra* note 100. My analysis of how this line of criticism applies to MacKinnon is discussed *infra* notes 189-203 and accompanying text.

105. Elizabeth M. Schneider has written about the way that the public/private distinction in law has resulted in the denial that domestic violence is a systemic, rather than simply a personal, domestic problem.

> Instead of focusing on the batterer, we focus on the battered woman, scrutinize her conduct, examine her pathology and blame her for not leaving the relationship, in order to maintain that denial and refuse to confront the issues of power. Focusing on the woman, not the man, perpetuates the power of patriarchy. Denial supports and legitimates this power; the concept of privacy is a key aspect of this denial.

Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 983 (1991). Strossen does not, of course, let Chuck Traynor off the hook, but she engages in a similar act of denial when she claims that Marchiano's problem was simply one of domestic abuse that cannot be taken as proof of a systemic problem.

for the law that could address women's issues in a truly responsive manner.[106]

Another woman's story that Strossen relies on to support her argument that women freely choose to work in the sex industry suffers from similar drawbacks. Strossen cites a letter she received from a woman named "Karen," who identified herself as a part-time nude dancer. Karen states,

> I am also a first year law student at one of the top law schools in the country. No one coerced me into the sex industry. I had a good, although not terribly lucrative, job as an assistant editor when I first started dancing. I do not do drugs. I have not been brainwashed. As a student, I find dancing to be a dream job. I work once a week, and make enough money to support myself.[107]

Although Karen herself considers nude dancing "a perfectly legitimate way to make a living," she laments that she must remain anonymous. "Because I am also pursuing a 'legitimate' career in law, my dancing career must remain my dark secret."[108]

Within the context of the limited options for even a college-educated woman to earn a decent living, Karen's decision to become a nude dancer was certainly a free choice. Moreover, she states that she enjoys nude dancing and there is no reason to disbelieve her. What she seems not to enjoy is that she cannot reveal her name and still successfully pursue a career as a lawyer. Both Strossen and MacKinnon would agree that feminists should attack the context of Karen's situation (*i.e.*, her inability to otherwise earn a decent living). Where they disagree is over the responsibility for creating that context.

Strossen posits Karen's problem as being one of someone who is in a difficult situation and who is only hurt by feminists

---

106. In the area of domestic violence, Kimberle Crenshaw has addressed the need for feminists engaged in combatting domestic violence to be more responsive to the forces which impact different women's ways of reacting to abuse.

> For example, shelter policies are often shaped by an image that locates women's subordination primarily in the psychological effects of male domination and thus overlooks the socioeconomic factors that often disempower women of color. Because the disempowerment of many battered women of color is arguably less a function of what is in their minds and more a reflection of the obstacles that exist in their lives, these interventions of logic can produce, rather than effectively challenge, their domination.

Kimberlé W. Crenshaw, *Panel Presentation on Cultural Battery*, 25 U. TOL. L. REV. 891, 894 (1995).

107. STROSSEN, *supra* note 3, at 193.

108. *Id.* at 194.

who insist that her work is degrading. This leads her to the conclusion that feminists should stop opposing nude dancing. This is logical. Yet, Karen's story makes MacKinnon's point as well: women who express themselves through public sexual activity are considered degraded by our society and cannot easily transfer into "legitimate" careers. From this perspective, it is utterly illogical to consider Karen's choice completely free, and therefore we need not protect the sex industry to protect Karen's freedom. To do so is to value an individual's right to make individual choices over the attempt to end oppression of women as a group.

It is difficult to make meaningful generalizations about when sex workers are being self-destructive and when they are being self-expressive in ways that subvert male domination. Both generalizations can be true, depending on the particular women involved. The pertinent question is how to assist the ones who are engaging in behavior that harms them. The answer will be found by listening to women such as Marchiano *and* to women such as Karen, not by citing one or the other depending on whose story supports a particular legal argument.

III. HATE SPEECH: THE SUPREME COURT'S REAFFIRMATION OF THE PRINCIPLE OF VIEWPOINT NEUTRALITY AND ITS EFFECT ON THE FEMINIST PORNOGRAPHY DEBATE

The previous two sections identified two main areas where Strossen and MacKinnon disagree: the issue of whether pornography is essentially speech or conduct and the symbolic message the law's treatment of pornography sends about the role of women in society. Their differing views on these questions point to the need for further exploration of the proper role of government in the struggle for social justice, in this case gender justice.

If one considers a private cause of action to be the effective equivalent of direct government censorship, as Strossen does, it is logical to conclude that it is dangerous to give additional authority to the government to regulate private conduct. If one agrees with MacKinnon that a civil cause of action would finally enable women to redress the harms caused by certain specific sexual expression, then such a law appears to be simply an appropriate harnessing of government power through the use of the judicial system. That difference of opinion influences the authors' respective positions on another example of government regulation of expression: hate speech.

Strossen's book does not comment on the substance of *R.A.V. v. St. Paul*.[109] Instead, she characterizes the case as an example of how the Supreme Court "has steadfastly enforced this fundamental principle [of viewpoint neutrality] to protect speech that conveys ideas that are deeply unpopular with or offensive to many, if not most, Americans."[110] To fully explore the ramifications of Strossen's criticism of MacKinnon's proposed antipornography legislation for violating the principle of viewpoint neutrality, it is helpful to first look at what the Court did in *R.A.V.*[111] and then to situate Strossen's argument within the context of the different opinions put forth by the Court in that case.

A. *The Different Opinions of the Supreme Court in* R.A.V. v. City of St. Paul

In *R.A.V.*, although the Court was unanimous in its judgment that the St. Paul ordinance criminalizing hate speech[112] was

---

109. 112 S. Ct. 2538 (1992).

110. STROSSEN, *supra* note 3, at 41. For an alternative view of *R.A.V.*, see Mari J. Matsuda & Charles R. Lawrence III, *Epilogue: Burning Crosses and the* R.A.V. *Case*, *in* WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 133, 133-36 (Mari J. Matsuda et al. eds., 1993) [hereinafter WORDS THAT WOUND] (criticizing *R.A.V.* for being "completely ahistorical and acontextual" and arguing that simply ending an analysis with the determination that hate speech *is* speech "is an affirmative harm to those whose injury goes unredressed by law").

111. For additional commentary on *R.A.V.*, see, e.g., G. Sidney Buchanan, *The Hate Speech Case: A Pyrrhic Victory for Freedom of Speech*, 21 HOFSTRA L. REV. 285 (1992); Scot R. Courtney, Comment, *"Hate Crime" Statutes* — R.A.V. *and Its Fallout*, 19 T. MARSHALL L. REV. 163 (1993); Donovan W. Gaede, Casenote, *Constitutional Law — Why the Supreme Court Hates Hate-Crime Ordinances*, 18 S. ILL. U. L.J. 481 (1994); Lisa S.L. Ho, Comment, *Substantive Penal Hate Crime Legislation: Toward Defining Constitutional Guidelines Following the* R.A.V. v. City of St. Paul *and* Wisconsin v. Mitchell *Decisions*, 34 SANTA CLARA L. REV. 711 (1994); Jeffrey M. Laurence, Comment, *Minnesota Burning:* R.A.V. v. City of St. Paul *and First Amendment Precedent*, 21 HASTINGS CONST. L.Q. 1117 (1994); Symposium, *Hate Speech After* R.A.V.*: More Conflict Between Free Speech and Equality?* 18 WM. MITCHELL L. REV. 889 (1992); Andrea L. Crowley, Note, R.A.V. v. City of St. Paul*: How the Supreme Court Missed the Writing on the Wall*, 34 B.C. L. REV. 771 (1993); Bruce A. Grabow, Note, R.A.V. v. City of St. Paul*: Dismantling Free Speech Jurisprudence to Make Room for Equal Treatment*, 3 WIDENER J. PUB. L. 577 (1993).

112. The St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn.Legis.Code, § 292.02 (1990) provided:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

unconstitutional, it was not unanimous in its reasoning. Justice Scalia wrote for the majority, finding St. Paul's ordinance "unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses."[113] The ordinance had been interpreted by the Minnesota Supreme Court such that the phrase "arouses anger, alarm or resentment in others" meant that the ordinance applied only to "fighting words," and that it was therefore constitutional.[114] Justice Scalia found that even as applied only to fighting words, the ordinance was unconstitutional. His interpretation of the protection afforded fighting words is that they can, "consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.) — not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content."[115] Thus, it is clear that what concerns Justice Scalia is not so much the fact that certain instances of speech would be prohibited. Rather, his concern is with the wider ramifications of a government entity taking a stand against any particular viewpoint.

Justice White, joined by Justices Blackmun and O'Connor, and in part by Justice Stevens, concurred in the judgment but would have held that the ordinance was overbroad on its face because it covers more than fighting words and "makes criminal expressive conduct that causes only hurt feelings, offense, or resentment, and is protected by the First Amendment."[116] In his concurrence, Justice White noted that the majority opinion failed to recognize that in the past, the Court has "plainly stated that expression falling within certain limited categories so lacks the values the First Amendment was designed to protect that the Constitution affords no protection to that expression."[117] Justice White observed that the majority opinion would force a legislature to criminalize all fighting words if it wants to criminalize

---

R.A.V., 112 S. Ct. at 2541. A juvenile designated "R.A.V." was charged with violating the statute when he was alleged to have burned a cross in the fenced-in yard of an African-American family. The trial court dismissed the charge before trial on the ground that the statute violated the First Amendment. The city appealed that decision. *In re* Welfare of R.A.V., 464 N.W.2d 507, 508 (Minn. 1991).

113. *R.A.V.*, 112 S. Ct. at 2542.

114. *In re* Welfare of R.A.V., 464 N.W.2d at 510-11 (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

115. *R.A.V.*, 112 S. Ct. at 2543.

116. *Id.* at 2560.

117. *Id.* at 2551 (citing *Chaplinsky*, 315 U.S. at 571-72).

any.[118] He further argued that "by characterizing fighting words as a form of 'debate,' the majority legitimates hate speech as a form of public discussion."[119]

Justice Stevens concurred in the judgment because he also found the statute overbroad[120] and concurred with Justice White's criticism of the majority opinion. He wrote a separate opinion so that he could "suggest how the allure of absolute principles has skewed the analysis of both the majority and concurring opinions."[121] Stevens argued that White's "categorical approach" to the First Amendment did not "take seriously the importance of *context*," stating that, "[a]s an initial matter, the concept of 'categories' fits poorly with the complex reality of expression."[122] Stevens disagreed with White that fighting words are "wholly unprotected." Instead, he argued, past decisions "establish a more complex and subtle analysis, one that considers the content and context of the regulated speech, and the nature and scope of the restriction on speech."[123] But for its being overbroad, Stevens would have found the ordinance constitutional.[124] He opined that the ordinance would regulate speech "not on the basis of its subject matter or on the viewpoint expressed, but rather on the basis of the *harm* the speech causes."[125] It would do so by criminalizing expression known to inflict injury.[126]

---

118. *Id.* at 2553.
119. *Id.* at 2553-54.
120. *Id.* at 2561.
121. *Id.*
122. *Id.* at 2566.
123. *Id.* at 2567.
124. Whether the selective proscription of proscribable speech is defined by the protected target ("certain persons or groups") or the basis of the harm (injuries "based on race, color, creed, religion or gender") makes no constitutional difference: what matters is whether the legislature's selection is based on a legitimate, neutral, and reasonable distinction.

Id. at 2565-66 (Stevens, J., concurring).
125. *Id.* at 2570.
126. Interestingly, Stevens added, "In this regard, the ordinance resembles the child pornography law [upheld] in *Ferber*, which in effect singled out child pornography because those publications caused far greater harms than pornography involving adults." *Id.* at 2570 citing N.Y. v. Ferber, 458 U.S. 747 (1982). This suggests that Stevens might accept as constitutional antipornography legislation based on a showing of harm, or would at least not vote to reverse findings of liability where harm was found by a lower court.

See also Stevens' dissent in Pope v. Illinois, 481 U.S. 497, 507 (1987), in which he argued for the unconstitutionality of criminalizing the possession or sale of obscene materials to consenting adults. Stevens criticized the Illinois statute's vagueness but added in a footnote, "The insurmountable vagueness problems involved in

B. *Strossen's Commitment to Viewpoint Neutrality*

Strossen's criticism of antipornography feminism parallels the reasoning of Justice Scalia's opinion in *R.A.V.*[127] She claims that the feminist antipornography movement's "pornocentric tunnel vision" distorts the reality of sexist imagery in two ways.[128] First, the focus on pornography ignores the extent to which sexist and violent images exist in the media apart from sexually explicit sexist images.[129] Second, the "pornocentric" view is distorted in that it assumes that pornography conveys misogynistic messages to all viewers. "To categorically condemn all sexual expression is as inane as categorically condemning all nonsexual expression or all expression in any other category, as if responses to anything were uniform, rather than totally individualized and unique."[130]

However, Strossen's overall argument is that since the same image can send different messages to different people, we must protect all sexual expression, even misogynistic expression.[131] This is simply to substitute one system of categorization for another. It is also the exact argument made by Justice Scalia in *R.A.V.* and criticized by Justice White: that if a legislature finds a form of expression to be fighting words, it would have to outlaw all fighting words, which is to outlaw no fighting words.[132] That interpretation of the First Amendment means that legislatures

---

criminalization are not, in my view, implicated with respect to civil regulation of sexually explicit material, an area in which the States retain substantial leeway." *Id.* at 516 n.11. Given that Justice Stevens was not joined by any justices in that particular footnote, it is unlikely that the current Supreme Court bench would support his view.

127. Indeed, Strossen makes no mention of diversity of opinion in *R.A.V.*, suggesting an agreement with the majority opinion: "The Court's unanimous ruling in [*R.A.V.*] underscores the secure status of the basic principle that expression conveying discriminatory ideas, including sexist ideas, is constitutionally protected." STROSSEN, *supra* note 3, at 61.

128. *Id.* at 142.

129. *Id.*

130. *Id.*

131. Just as *suppressing* sexual speech plays an essential role in *maintaining* the political, social, and economic status quo, conversely, *protecting* sexual speech plays an essential role in *challenging* the status quo. Accordingly, the women's rights cause should naturally be allied with the free speech cause for all expression, including sexual. Once again, the sexual *is* political.

Id. at 178.

132. For further analysis of *R.A.V.*, see Ruthann Robson, *Incendiary Categories: Lesbians/Violence/Law*, 2 TEX. J. WOMEN & L. 1, 20-27 (1993). Robson suggests that disagreement over whether fighting words have "special force" (hence proscrib-

cannot effectively legislate on matters they determine cause problems within their jurisdiction. Thus persons subject to private abuse of power are prevented from relying on participatory democracy to protect themselves.[133] And, as Justice White pointed out, that approach to the First Amendment tends to legitimize hateful expression by making the fact that it is expression more important than the fact that it causes harm.

The emphasis on viewpoint neutrality as opposed to whether certain expression causes injury ignores the question of whether sometimes private expression can have more of a devastating impact than would government restriction of expression. It takes for granted that government-sanctioned restriction of expression is the only restriction of expression which is harmful, as if finding a cross burning on one's lawn is not a restriction of an expressed wish to live in a particular neighborhood.[134] Most importantly, this reasoning ignores the more complex and compelling question of how local governments can protect citizens from harmful conduct that is also expressive.[135]

With hate speech, as with pornography, a fundamental question to be resolved is the question of the role of government in distributing power. It may be that the protection against government needs to be re-examined as groups traditionally excluded

---

able) when applied to persons who have historically been subjected to violence may be what divided the justices in *R.A.V.* *Id.* at 23.

133. As Matsuda and Lawrence observe:

> Hate crime ordinances came about not because local legislators were bent on oppressing a tiny minority of unpopular racists, but because hate crimes had reached such an epidemic proportion that no one concerned with keeping the peace could ignore them. Civil rights organizations struggled mightily to raise public consciousness about the prevalence of hate crimes and to show how the targets of hate crimes were disempowered, silenced, and disenfranchised. None of this is mentioned in the Scalia opinion, however. Instead, local legislators dealing responsibly with local problems are painted as group-think imposers of orthodoxy.

Matsuda & Lawrence, *supra* note 110, at 135.

134. Mari Matsuda observes that because racist speech is seen as private, "the connection to loss of liberty is not made." Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, *in* WORDS THAT WOUND, *supra* note 110, at 17, 49.

135. MacKinnon comments on how the *R.A.V.* decision obscures the harm caused by the message that crossburning expresses. "Like pornography, crossburning is seen by the Supreme Court to raise crucial expressive issues. Its function as an enforcer of segregation, instigator of lynch mobs, instiller of terror, and emblem of official impunity is transmuted into a discussion of specific 'disfavored subjects.' " MACKINNON, *supra* note 2, at 34 (citing *R.A.V.*, 112 S. Ct. at 2547).

begin to participate in government. The judgment in *R.A.V.* and the differing opinions supporting it make clear that more debate is needed to clarify the ways in which speech can cause injury. Perhaps then the law can be configured to acknowledge distinctions between expressions of viewpoints deserving protection and those expressions of racist and sexist hatred that cause injury and therefore would not be protected under any of the standards set forth in *R.A.V.*

IV. Pornography and Sexual Harassment Law

One area of law where expression may be constitutionally proscribed is sexual harassment law.[136] Strossen does not attack the principle of laws against sexual harassment; she considers its implementation to have begun to undermine both free speech and women's rights.[137] Yet if MacKinnon is correct that one person's expression may need to be suppressed in order for another's to flourish, and that it has traditionally been women's voices that have been silenced, then it would seem that this debate is fundamentally about whose expression matters. Sexual harassment law may well be a good indicator of the extent to which changes in the law truly improves women's lives — specifically their work and school environments — and whether there is any corresponding "chilling" effect on expression.

A. *MacKinnon's Views on the Threat to Sexual Harassment Law Since* R.A.V.

Although MacKinnon clearly favors laws against both racial and sexual harassment, in *Only Words* she focuses less on the harms caused by such harassment than on responding to the ramifications of the *Hudnut* and *R.A.V.* decisions. MacKinnon's analysis of sexual harassment in *Only Words* must be interpreted in light of the *R.A.V.* decision. Her concern is that "attempts to defend regulation of racial harassment in education on the basis of sexual precedents have not been persuasive, yet decisions invalidating racial harassment codes threaten to take sexual har-

136. The Supreme Court has held that sex discrimination in a government workplace violates the Due Process Clause of the Fifth Amendment. Davis v. Passman, 442 U.S. 228 (1979). Sexual harassment calculated to drive someone out of the workplace constitutes sex discrimination under the Equal Protection Clause. *See, e.g.*, Annis v. County of Westchester, 36 F.3d 251 (2d Cir. 1994).

137. Strossen, *supra* note 3, at 121.

assment regulations down with them."[138] She attempts to distinguish racial and sexual harassment, not on the theory that one causes more harm than the other, but on the basis of her claim that sexual abuse (or sexual harassment or pornography) *is* sex.

> For expressive purposes, the distinction that matters, in my view, is not between harassment based on race and harassment based on gender, which are often inseparable in any case, but between speech that is sex and speech that is not. Harassment that is sexual is a sex act, like pornography. Harassment that is not sexual works more through its content, as the traditional model of group defamation envisions, however hateful and irrational, however viscerally it plays on prejudice, however damaging to equality rights.[139]

For MacKinnon, it is not inconsistent to argue that sexual harassment is a sex act, because she considers abusiveness to be an integral part of the way we perceive sexuality.[140]

MacKinnon's assessment of sexual harassment also analyzes the power of language to shape reality and the impact of words of violence which are associated with actual violence. "It matters that children are being sexually abused as the words of abuse are spoken and pictures taken. It matters that electrodes are being applied to the genitals of women being called 'cunt' in photography studios in Los Angeles and the results mass-marketed."[141]

---

138. MACKINNON, *supra* note 2, at 55. One could argue that it is the other way around, since *Hudnut* preceded *R.A.V.* Elena Kagan has assessed the two decisions and observed that the reasoning in *R.A.V.* "closely resembles" that in *Hudnut*, although she stresses that the principle of viewpoint neutrality was not new and "did not emerge alongside of, or in response to, the effort to curtail certain forms of racist and sexist expression." Elena Kagan, *Regulation of Hate Speech and Pornography After* R.A.V., 60 U. CHI. L. REV. 873, 875 (1993).

139. MACKINNON, *supra* note 2, at 56.

140. That perception, she maintains, is both reflected in and shaped by pornography:

> In pornography, there it is, in one place, all of the abuses that women had to struggle so long even to begin to articulate, all the *unspeakable* abuse: the rape, the battery, the sexual harassment, the prostitution, and the sexual abuse of children. Only in the pornography it is called something else: sex, sex, sex, sex, and sex, respectively. Pornography sexualizes rape, battery, sexual harassment, prostitution, and child sexual abuse; it thereby celebrates, promotes, authorizes, and legitimizes them. More generally, it eroticizes the dominance and submission that is the dynamic common to them all.

MACKINNON, FEMINISM UNMODIFIED, *supra* note 5, at 171; *see also* MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 5, at 126-54 (discussing the model of society as a "sexualized hierarchy").

141. MACKINNON, *supra* note 2, at 59.

For MacKinnon, these facts make it a denial of reality to say that words do not have the power to harm.

> Were there no such thing as male supremacy, and were it not sexualized, there would be no such injury as sexual harassment. Words do not do it alone, of course, but what sexual harassment does, only words can do — or, rather, the harm of sexual harassment can be done only through expressive means.[142]

MacKinnon concedes the tenuousness of her distinction between racial and sexual harassment by noting that there is often a sexual component to the expression of racial hatred. She cites examples of both the sexual atrocities often committed as part of lynchings of black men and the use of race, ethnicity and religion for sexual excitement in pornography.[143] She also cites as a recent example the reaction to Anita Hill's allegations of sexual harassment by Clarence Thomas made in the Senate confirmation hearings: "In this episode, the language of sexual abuse collided with the language of public discourse; women's reality collided with everyday politics as usual, the distance between the two measured by one word: credibility. When speech is sex, it determines what is taken as real."[144] MacKinnon observes that instead of believing Anita Hill, many people attributed the vulgarity of the acts described to Hill herself, because she spoke the words. This phenomenon suggests not only the power of sex to influence, but also the power of prejudice to determine the direction that the highly charged sexual content will take.[145] That is, the sexual content of the hearings supplied a great deal of tension, but people's pre-conceived notions of who is responsible

142. *Id.* at 60.

143. *Id.* at 63-64.

144. *Id.* at 64.

145. This same phenomenon may be at work in the way reviewers respond to MacKinnon's work. It may be that some people find it so distasteful that a woman is writing about crude sex acts that they associate the language with her instead of with the perpetrators of acts she describes. Ronald Dworkin, for example, complains in his review, "*Only Words* is full of language apparently intended to shock. It refers repeatedly to 'penises slamming into vaginas,' offers page after page of horrifying descriptions of women being whipped, tortured, and raped . . . ." Ronald Dworkin, *Women and Pornography*, N.Y. REV. BOOKS, Oct. 21, 1993, at 36. MacKinnon does use explicit language as a rhetorical device to convey the seriousness of what she considers the harm of pornography. But it is not a stylistic trick tacked onto an argument. It is an integral part of her proposition that people who defend pornography on First Amendment grounds often overlook the atrocities enacted in pornography. Dworkin does not seem to have recognized this.

when sexual harassment occurs also influenced how people lined up with either Hill or Thomas.[146]

MacKinnon's attempt to distinguish racial and sexual harassment on the theory that sexual harassment is a sex act is clearly inadequate. While it may expand the definition of sex, it constricts the definition of harassment. This construction hurts the effort to persuade courts to recognize the harms that *all* forms of harassing speech can cause. Mari Matsuda, for example, argues for a new First Amendment category consisting of three identifying characteristics that should be required to distinguish the worst forms of racist hate speech: "[t]he message is of racial inferiority . . . is directed against a historically oppressed group [and] . . . is persecutory, hateful and degrading."[147] Matsuda calls her idea a "non-neutral value-laden approach that will better preserve free speech."[148] One reason offered by Matsuda that her approach would not lead to a repeat of McCarthyism is that there is universal agreement that racism is wrong.[149]

My point is not to argue the merits of Matsuda's argument on behalf of restriction of racial harassment. It is simply to suggest that Matsuda is on the right track by focusing on the fact that it is the content of certain kinds of speech that makes it harmful. This is what MacKinnon argues when she maintains that constitutional equality rights should be balanced against free speech rights. It is not clear why MacKinnon would move away from that position in discussing sexual harassment.

In addition, examination of the relationship between racist and sexist sexual expression provides a useful framework through which to articulate when expression is harmful. Patricia Hill Collins has explored the connections among race, sex and class in pornography, noting as one example the connection between frequent representations of African-American women breaking from chains and the institution of slavery.

> The pornographic treatment of Black women's bodies challenges the prevailing feminist assumption that since pornography primarily affects white women, racism has been grafted onto pornography. African-American women's experiences suggest that Black women were not added into a preexisting

146. For a collection of critical analyses of the Hill-Thomas controversy, see RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY (Toni Morrison ed., 1992).

147. Matsuda, *supra* note 134, at 36.

148. *Id.*

149. *Id.* at 37.

> pornography, but rather that pornography itself must be reconceptualized as an example of the interlocking nature of race, gender, and class oppression. At the heart of both racism and sexism are notions of biological determinism claiming that people of African descent and women possess immutable biological characteristics marking their inferiority to elite white women. In pornography these racist and sexist beliefs are sexualized. Moreover, for African-American women pornography has not been timeless and universal but was tied to Black women's experiences with the European colonization of Africa and with American slavery. Pornography emerged within a specific system of social class relationships.[150]

Hill's concern in this passage is with the generalized harm that results from the dissemination through pornography of ideas promoting race, gender and class oppression.

Even if one maintains that the pornography Hill describes is not and should not be legally actionable, it is difficult to dispute its potential to spread harmful ideas. Nor could her objection to it be conceived as simply "anti-sex." That is, the expression she describes which links slavery with eroticism highlights the way in which pornography that portrays any group of people as sexually subordinate tends to reinforce the notion that the same group belongs in a culturally subordinate position as well. Hence it is no coincidence that men working in traditionally male dominated occupations would choose to use the display of pornography in the workplace to send the message that women do not belong there.[151]

B. *Strossen's Views on Sexual Harassment*

For Strossen, the pornography debate is not only a distraction from the more serious problem of sex discrimination, it is actually harmful to women's attempt to gain equality through gender discrimination law. She argues that the antipornography movement has led to the proliferation of false sexual harassment claims. "The all-purpose epithet 'pornography' has been joined by a functional synonym, 'sexual harassment,' to stigmatize, and hence suppress, seemingly any expression that even hints at sexual themes. This decontextualized, demonized approach to art

150. PATRICIA HILL COLLINS, *Pornography and Black Women's Bodies*, BLACK FEMINIST THOUGHT 167-73 (1990), *reprinted in* MAKING VIOLENCE SEXY, *supra* note 1, at 100.

151. *See, e.g.,* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fl. 1991), discussed *infra* note 161-64 and accompanying text.

and expression betrays a fundamental misunderstanding of images and words."[152] As a result of this connection between pornography and sexual harassment, Strossen argues that sexual expression entitled to First Amendment protection is being swept up in charges of sexual harassment. She explains that "[t]he misguided emphasis on sexually oriented expression has diverted the attention of policy makers from *sexist conduct* to *sexual speech*, and has shifted their focus from gender-based discrimination to sexual expression."[153] Strossen fears that under current law any speech of a sexual nature can now be equated with discrimination.

Strossen is also unequivocal about where responsibility for this tenuous connection between pornography and sexual harassment should be attributed: "[P]ornophobic feminists . . . have used the concept of sexual harassment as a Trojan horse for smuggling their views on sexual expression into our law and culture."[154] She laments that Supreme Court rulings defining sexual harassment, including *Meritor Savings Bank v. Vinson*[155] and the more recent *Harris v. Forklift Systems, Inc.*,[156] are consistent with MacKinnon's views.[157] Those cases established, respectively, that a hostile environment caused by sexual harassment constitutes gender discrimination and that it is not necessary for a plaintiff to establish psychological injury from the harassment.

Strossen agrees with Justice O'Connor's majority opinion in *Harris* that determining whether conduct is sexually harassing must be done in context,[158] but Strossen adds that defining sexual harassment is difficult when the behavior is expression that is entitled to First Amendment protection outside of the context of employment.[159] She further adds that the ACLU maintains that

152. STROSSEN, *supra* note 3, at 129.

153. *Id.* at 121.

154. *Id.* at 119.

155. 477 U.S. 57 (1986).

156. 114 S. Ct. 367 (1993).

157. "It is not surprising that the concept of sexual harassment has proven a fast-lane vehicle for transporting the feminist anti-pornography analysis into our law, since Catharine MacKinnon has been a leading theorist and activist in both areas." STROSSEN, *supra* note 3, at 120.

158. Justice O'Connor explained that to determine whether an abusive environment existed, courts must look at all circumstances, which may include the following factors: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." 114 S. Ct. 367, 371. No single factor is required. *Id.*

159. STROSSEN, *supra* note 3, at 124.

all employees should enjoy freedom of expression while at work, "as long as that expression does not substantially interfere with workplace operations."[160] Strossen's stridency in this area is characteristic of her position as a free speech absolutist. As an absolutist, she places a heavy burden of proof that expression causes harm before it can be restricted.

Strossen cites *Robinson v. Jacksonville Shipyards, Inc.*[161] as an example of sexual expression that did in fact constitute sexual harassment based on the context of the expression.[162] In that case, the court found that the plaintiff Lois Robinson, a welder, endured a hostile environment that consisted of "extensive, pervasive posting of pictures depicting nude women, partially nude women, or sexual conduct and . . . other forms of harassing behavior perpetrated by her male coworkers and supervisors."[163] Robinson's coworkers left sexually explicit photographs of women with characteristics similar to the plaintiff on her toolbox, which the court found to have been done with the intent to offend Robinson.[164]

Strossen argues that although the court in *Robinson* appropriately found in favor of the plaintiff, its order prohibiting all sexually explicit materials, including materials intended for private consumption, from that particular workplace went too far. She notes that the ACLU's appellate brief in *Robinson* had argued that the court order's prohibition of pictures of a woman

160. *Id.* at 125. It is interesting that the interference that bothers Strossen is with workplace operations, not an employee's well-being.

161. 760 F. Supp. 1486 (M.D. Fl. 1991), *appeal docketed*, No. 91-3655 (11th Cir. July 12, 1991), *appeal dismissed per stipulation*. The case was argued on appeal but settled before the 11th Circuit reached a decision. For discussion of *Robinson*, see, e.g., Paul B. Johnson, *The Reasonable Woman in Sexual Harassment Law: Progress or Illusion?*, 28 WAKE FOREST L. REV. 619 (1993); Toni Lester, *The Reasonable Woman Test in Sexual Harassment Law — Will It Really Make a Difference?*, 26 IND. L. REV. 227 (1993); Nadine Strossen, *Sexual Harassment in the Workplace: Accommodating Free Speech and Gender Equality Values*, 31 FREE SPEECH Y.B. ANNUAL 1 (1993); Michael E. Collins, Note, *Pin-ups in the Workplace — Balancing Title VII Mandates with the Right of Free Speech*, 23 CUMB. L. REV. 629 (1993); Amy Horton, Note, *Of Supervision, Centerfolds, and Censorship: Sexual Harassment, the First Amendment, and the Contours of Title VII*, 46 U. MIAMI L. REV. 403 (1991); Nell J. Medlin, Note, *Expanding the Law of Sexual Harassment to Include Workplace Pornography:* Robinson v. Jacksonville Shipyards, Inc., 21 STETSON L. REV. 655 (1992).

162. STROSSEN, *supra* note 3, at 126.

163. *Robinson*, 760 F. Supp. at 1494. The case includes approximately ten pages of details on the amount of sexually explicit materials on display in the workplace and the plaintiff's co-workers' jokes about the fact that the pictures upset the plaintiff. *Id.* at 1493-1502.

164. *Id.* at 1497.

"who is not fully clothed or in clothes that are not suited to . . . routine work in and around the shipyard and who is posed for the obvious purpose of . . . drawing attention to private portions of . . . her body"[165] was overly broad. The ACLU was concerned that the prohibition "could well encompass fashion magazines, family photographs, and classic works of art."[166]

The ACLU's fears, Strossen reports, proved to be "sadly prophetic in 1993, when officials of the University of Nebraska at Lincoln ordered a graduate teaching assistant to remove from his desktop a photograph of his wife in a bathing suit."[167] Strossen does not simply criticize the University of Nebraska officials for that incident. (Nor for that matter does she discuss the context of the display of the photograph.) Her implicit criticism is that if the University of Nebraska officials erred, the *Robinson* court must have erred for failing to forsee that some school would misapply the ruling and extend it beyond its factually specific holding.

Strossen's concern is not limited to case law; she is also worried about actions being taken by employers and campus officials to prevent sexual harassment. She fears that now these officials have "legal and practical incentives to err in favor of overbroadly defining sexual harassment and overzealously enforcing antiharassment policies."[168] Strossen would prefer that officials err in favor of free speech rights.

Strossen's point that not all kinds of sexual references to women are harassment is important. However, at times she seems to be suggesting that no sexual reference is harassment. For example, she criticizes Pennsylvania State University Professor Nancy Strumhofer's insistence that "the celebrated Spanish painter" Francisco de Goya's *Nude Maja* be removed from a classroom in which she taught. Strumhofer wanted to prevent the painting from being hung in any part of the campus because, Strossen states, in accordance with Penn State's sexual harassment policy, it made her "uncomfortable about sexual issues."[169]

Strossen's dismissal of the seriousness of Professor Strumhofer's complaint suggests she believes that since Goya

165. STROSSEN, *supra* note 3, at 127 (quoting *Robinson*, 760 F. Supp. at 1542).
166. *Id.*
167. *Id.*
168. *Id.* at 128.
169. *Id.* at 22 (citing Nat Hentoff, *Sexual Harassment by Francisco Goya*, WASH. POST, Dec. 27, 1991).

was a celebrated painter, a complaint about the hanging of the painting on campus walls is automatically ridiculous. She does not acknowledge that even "true art" can be used for sexually harassing purposes. A university's decision to hang a painting of a nude woman in a classroom, notwithstanding sincere complaints by female students and professors that their learning environments are adversely affected, certainly would send the message that the women's complaints simply do not matter. Similarly, if Lois Robinson's co-workers had placed a copy of the *Nude Maja* on her toolbox, one would hope Strossen would not argue they did so in the spirit of art appreciation. To do so would simply be an indirect way of arguing that if a woman complains about an adverse effect caused by a work of art, protection for the work of art—regardless of its context—takes priority.

Strossen notes that after that incident, Strumhofer was herself charged with sexual harassment for her method of teaching students of how women are represented in art. Strossen's only comment on this result of Strumhofer's initial complaint is to begin her discussion of it with the word "ironically."[170] Strossen does not question the motives of the students who brought the complaint against Strumhofer. Strossen's failure to even suggest that the response was backlash against a woman speaking out about sexual harassment undermines her argument.[171] Perhaps Strossen considers the male students' response inevitable, and

---

170. *Id.* at 128-29.

171. Lynne Segal has examined the complexity of the male backlash against women's rights, stressing the important role of changing economic forces:

> [Male] fears must be seen, primarily, in terms of the far deeper social insecurities of joblessness and personal disintegration caused by economic recession and restructuring over the last decade. Such personal powerlessness clashes violently with prevailing conceptions of the power and prerogatives of manhood. Far more than feminism ever could, these are the social forces which threaten the conventional attributes of manhood, of the work-oriented, skilled, ambitious husband and father.

LYNNE SEGAL, STRAIGHT SEX: RETHINKING THE POLITICS OF PLEASURE 277 (1994) (footnote omitted).

While Segal does not engage in a detailed analysis of the antipornography feminist role in this backlash, she shares Strossen's view that the antipornography feminists perpetuate this backlash. "Meanwhile the doom-laden theatricality of Andrea Dworkin and Catharine MacKinnon renews and strengthens the one-dimensional drift of backlash alarmism." *Id.* at 280. My point is that Segal's observations highlight the need to critically examine the extent to which MacKinnon and Dworkin may share responsibility for the backlash against feminism without simply blaming them for it.

that inevitability means the school's sexual harassment policy was misguided.

It is critically important that women be able to articulate why certain sexual expression makes them uncomfortable, and it is not unreasonable for sexual harassment rules to require a precise articulation rather than simply a statement of discomfort. Nonetheless, Strossen's overall argument on this point is undermined by her apparent refusal to acknowledge that it is a relatively new phenomenon for women to be able to speak about the way that artistic images contribute to the subordination of women. What may be inevitable is that issues will be raised which require people to think in new ways about sexual expression, and these issues will require sensitivity on the part of everyone involved. In the meantime, does Strossen really want to go back to the days when women students were called irrational for objecting to misogyny in art and literature, or worse yet, never bothered to raise the issue at all?

Strossen acknowledges that certain nonassaultive sexual conduct could constitute sexual harassment if the conduct is both severe and pervasive, but concludes that "isolated incidents where the behavior is not targeted at someone who has less authority or status should not be deemed harassment."[172] Strossen makes three arguments for why it is wrong for employers and campus officials to deem that any kind of sexual reference to a woman is sexual harassment. First, she argues that such rules trivialize sexual harassment and undermine "serious" attempts to deal with sexual harassment. Second, Strossen argues that such

172. STROSSEN, *supra* note 3, at 25. While Strossen's position that one incident is not enough is consistent with the law governing sexual harassment in the employment context, her contention that one cannot be harassed by a peer is not.

To state a claim of sexual harassment under Title VII of the Civil Rights Act of 1964, a plaintiff must show that the harassment was "sufficiently severe or pervasive" to alter the conditions of employment and create an abusive environment. Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986). At least one court has specifically held that one incident is not enough. Nieto v. United Auto Workers Local 598, 672 F. Supp. 987 (E.D. Mich. 1987) (single incident of eleven union members subjecting an employee to sex-based and race/national origin-based verbal abuse was held not to constitute a pattern of conduct sufficient to poison the entire working environment).

In Doe v. Petaluma City School Dist., 830 F. Supp. 1560 (N.D. Cal. 1993), a district court held that a plaintiff may bring a Title IX hostile environment case for sexual harassment by a peer, but the plaintiff must prove intentional discrimination on the basis of sex by an employee of the educational institution. *Id.* at 1571. In *Petaluma*, the plaintiff alleged that the principal of her junior high school failed to take action to stop repeated sexual harassment of the plaintiff by her peers.

rules reinforce the notion that sex is inherently demeaning to women, which in turn inhibits women from living full sexual lives. Third, Strossen argues that such rules make it harder for women to get jobs in the places that might implement these policies to accommodate women. Strossen argues that this constitutes old-fashioned "protection" of women that in fact functions to deny women their rights.[173]

For example, Strossen laments that women are being denied the opportunity to have male mentors on campus and in the workplace out of fear of sexual harassment charges.

> I know from my own involvement in professional legal organizations that many female lawyers believe that, because of hyperbolic harassment charges, they are being denied travel, social, and other opportunities for informal interaction with male partners and clients that would help them to rise to leadership positions at their firms.[174]

Curiously, Strossen makes no other comment on this trend, apparently accepting at face value the decision to deny women opportunities out of fear of false sexual harassment charges. One would expect it to raise her libertarian ire that individual women are being discriminatorily denied opportunities because of generalizations made about women.

Strossen's analysis reveals a willingness to maintain the status quo rather than risk the exclusion of women from male-dominated work environments. She does not take into consideration that women who in the past remained silent when others engaged in activity that made their environments hostile had to change their behavior. In much the same way, men are now being required to respect the rights of women colleagues and to change their behavior accordingly. The difference is that women's compromise was formerly tacitly accepted by most people and men's compromise must be demanded. These are difficult negotiations over workplace rules; however, they are not compelling reasons for weakening enforcement of Title VII sexual harassment law for fear of women appearing weak.[175]

The fear of false charges of sexual harassment parallels the fear of false rape charges. The proper response to this fear is not

---

173. STROSSEN, *supra* note 3, at 137-40.

174. *Id.* at 140.

175. For a discussion of the potential conflict between the First Amendment and workplace sexual harassment, see Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461 (1995).

to argue against making rape a crime. Rather, the logical response is to condemn false accusations when they occur while stressing that they are the exception rather than the rule. Feminists should be united on one thing if nothing else: when women complain of sexual harassment it is not because these women are "anti-sex" but because women do not like harassment. Women must continue to insist that sexual harassment is very real while learning to distinguish acceptable sexual expression from harassment. Finally, women must fight to ensure that the battle against sexual harassment is not used to keep women out of male-dominated occupations.

Both Strossen and MacKinnon perceive a grave threat to women's rights from developments in sexual harassment law but each author attributes that threat to different sources. Interestingly, each in her own way risks the appropriation of her ideas by those seeking to turn back the progress of women's struggle for equal rights, but to criticize either of them on that ground would be unproductive. Perhaps the lesson that emerges from their disagreement is that women's needs, in both the workplace and in schools, should be at the center of the debate on harassment policies and that women should work together to find ways to ensure that their shared concerns are protected by law.

V. ANTIPORNOGRAPHY LEGISLATION MAY NOT BE USED AS IT IS INTENDED

One potent criticism that Strossen directs at the feminist antipornography movement is that the works that would be affected by antipornography legislation would not be the kinds of works which MacKinnon and Dworkin intend to be affected. Strossen first argues that historically women and racial minorities have been disproportionately persecuted under obscenity laws. Strossen invokes the example of Margaret Sanger, who was repeatedly prosecuted for obscenity for distributing information on birth control.[176] She points out that as recently as 1993 women were the victims of speech restriction as a result of the "gag rule" prohibiting federally-funded family planning clinics from giving patients advice on abortion.[177] Strossen argues that anti-

176. STROSSEN, *supra* note 3, at 226-27.

177. *Id.* at 225.

pornography legislation can be another tool of patriarchy if enacted before more systemic changes are made.[178]

A. *The Targeting of Lesbian and Gay Materials by Canadian Customs Officials: Would it Happen Here?*

The most compelling example Strossen identifies is the experience in Canada in the wake of the Canadian Supreme Court's decision in *Butler v. Her Majesty the Queen*.[179] Strossen notes that the primary target of Canadian Customs' seizure of allegedly obscene materials have been gay and lesbian materials.[180] Strossen argues that a similar result would occur here for two reasons: "the inherently vague concept of 'subordinating' or 'degrading'

---

178. One persuasive example cited by Strossen as a rule being used against those it was ostensibly intended to protect is the hate speech code at the University of Michigan in the late 1980s, which the ACLU successfully challenged as unconstitutional. Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989). Strossen noted:

> During the year and a half that the University of Michigan rule was in effect, there were more than twenty cases of whites charging blacks with racist speech. More importantly, the only two instances in which the rule was invoked to sanction racist speech (as opposed to other forms of hate speech) involved the punishment of speech by or on behalf of black students. The only student who was subjected to a full-fledged disciplinary hearing under the Michigan rule was an African-American student accused of homophobic and sexist expression.

STROSSEN, *supra* note 3, at 223.

Charles R. Lawrence III has written that the University of Michigan's policy was so vague and overbroad that it is almost as if the school never intended it to be an effective remedy. Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, *in* WORDS THAT WOUND, *supra* note 110, at 83-84.

179. [1992] 1 S.C.R. 452 (Can.). The Court upheld the Canadian Criminal Code's definition of obscenity, which states: "For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene." Criminal Code, R.S.C., ch. C-34, § 159(8) (1970) (Can.). The section of the statute was changed to 163 in 1985.

For a discussion of the ramifications of *Butler*, see Jodi Aileen Kleinick, Comment, *Suppressing Violent and Degrading Pornography to "Prevent Harm" in Canada:* Butler v. Her Majesty the Queen, 19 BROOK. J. INT'L. L. 627 (1993) (arguing that the decision was wrong to allow suppression of violent pornography because it cannot be demonstrated that the materials cause harm, and suggesting that the decision was actually morality-based and will perpetuate women's inequality).

180. STROSSEN, *supra* note 3, at 231 (citing *Canada Customs Hits Feminist Stores and Others*, FEMINIST BOOKSTORE NEWS, Mar.-Apr. 1993, at 21). Strossen also cites the *Toronto Globe & Mail* for the estimate that 75% of shipments to gay and lesbian bookstores have been seized. *Id.* at 235 (citing Editorial, *Reading between the Borderlines*, TORONTO GLOBE & MAIL, June 30, 1992). For further discussion of lesbian materials being targeted by Canadian Customs, see also Victoria A. Brownsworth, *Gagging Ourselves?*, 4 LAMBDA BOOK REP., Sept.-Oct. 1994, at 11.

material that is at the heart of all MacDworkinite laws; and the homophobic, antifeminist orientation that many Canadian officials share not only with their U.S. counterparts, but also with many private citizens in both countries."[181] In *Defending Pornography*, Strossen catalogues some of the experiences of lesbian writers and book sellers subjected to criminal prosecution since *Butler* to demonstrate the extent of the problem.[182]

One telling example is the conviction of the owners of the Glad Day Bookstore in Toronto for selling the lesbian magazine *Bad Attitude*, while a mainstream bookstore selling the same magazine was left alone.[183] Strossen reports that the judge who ruled in the case cited a story about a woman who was surprised in the shower by another woman and beaten, but then engaged in consensual sexual relations with the stranger. The judge found the facts that the aggressor was female and that the encounter was ultimately consensual to be irrelevant. The Court concluded, "The consent . . . far from redeeming the material, makes it degrading and dehumanizing."[184] Strossen cites another case where a judge found certain gay publications to be degrading and dehumanizing simply because they showed sexual encounters which, in his view, lacked "any real, meaningful human relationship."[185]

Strossen thus makes a compelling argument that reveals a major flaw in antipornography legislation which would not allow different meanings to be ascribed to one act by different viewers. She persuasively argues that the potential for a disproportionate impact on lesbian and gay work in the United States raises serious doubts about the potential effectiveness of restriction of por-

181. STROSSEN, *supra* note 3, at 231.

182. Of course, gay and lesbian materials were not the only ones targeted. Strossen reports that Andrea Dworkin's books *Pornography: Men Possessing Women* and *Woman Hating* were seized, as was a novel on pedophilia by Robert Lally, a retired Canadian psychologist. The novel, about how pedophiles think and operate, was written with the hope of mobilizing the public against pedophilia. *Id.* at 237-38. These examples further illustrate her point that pre-existing prejudices of all kinds play a major rule in how courts will determine whether work is pornographic.

183. *Id.* at 232.

184. *Id.* at 233 (quoting R. v. Scythes, O.J. No. 537 Ont. Prov. Ct. (1993) (Can.)). This case also involved Glad Day Bookshop. For further discussion of this case, see Ann Scales, *Avoiding Constitutional Depression: Bad Attitudes and the Fate of* Butler, 7 CAN. J. WOMEN & L./R.F.D. 349 (1994).

185. STROSSEN, *supra* note 3 (quoting Glad Day Bookshop v. Deputy Minister of Nat'l Revenue for Customs and Excise (DMVR), O.J. No. 1466 Ont. H.C. (1992) (Can.)).

nography.[186] Nevertheless, it is less clear that "subordinating" and "degrading" are "inherently vague concepts." This is another example where Strossen simply concludes that nothing can be done; we cannot agree on these kinds of definitions, so the law should not address the degradation or subordination of women even where it may actually exist. Instead, I would argue that the law's definition of subordination and degradation are inherently vague and that perhaps this vagueness can be clarified.

In *Only Words*, MacKinnon praises the Canadian Supreme Court for the important symbolic message it sent by upholding the obscenity statute at issue in *Butler*.

> [The Supreme Court of Canada] said that harm to women — which the Court was careful to make 'contextually sensitive' and found could include humiliation, degradation, and subordination — *was* harm to society as a whole. The evidence on the harm of pornography was sufficient for a law against it. Violent materials always present this risk of harm, the Court said; explicit sexual materials that are degrading or dehumanizing (but not violent) could also unduly exploit sex under the obscenity provision if the risk of harm was substantial.[187]

MacKinnon and Andrea Dworkin recognized the problems with the Canadian antipornography law and explain that the problems in Canada stem from the fact that the Canadian law involves *criminal* prosecutions, not the *civil* cause of action they proposed.[188]

---

186. Ann Scales, however, *supra* note 184, has cautioned against the use of the gay and lesbian experience to de-legitimate *Butler*. *Id.* at 356. Scales stresses the importance of distinguishing problems with the law from problems caused by homophobic government officials.

> From a gay and lesbian perspective, [enforcement of sexual orthodoxy] was inevitable: in a society that hates us so much, any shift in cultural situation will be an occasion to escalate our demise. . . .
>
> *Butler* itself said nothing about gay and lesbian people. State officials made the decisions to take *Butler* to the throats of fragile communities (such as gay men and lesbians), and the press jumped on that as if the heavens had indeed fallen.

Id. at 361 (citing John Leo, *Censors on the Left*, U.S. NEWS & WORLD REP., Oct. 4, 1993; Ted C. Fishman, *Northern Underexposure*, PLAYBOY, June 1994; *Interview with Nat Hentoff*, DEFENDER, May 1994, at 8-9; Leanne Katz, *Censors' Helpers*, N.Y. TIMES, Dec. 3, 1993, at 15; Tim Kingston, *Canada's New Porn Wars*, S. F. BAY TIMES, Nov. 4, 1993; Thelma McCormack, *Keeping Our Sex "Safe": Anti-Censorship Strategies vs. the Politics of Protection*, FIREWEED, Winter 1993, at 25).

For further discussion of Scales' perspective on *Butler*, see infra notes 221-34 and accompanying text.

187. MACKINNON, *supra* note 2, at 101.

188. Canada has not adopted our civil rights law against pornography. It has not adopted our statutory definition of pornography; it has not

It may be true that the terms "subordinating" and "degrading" are more difficult to define in the context of a court's determination of whether a work is degrading or subordinating in the abstract, as in an obscenity prosecution where the harm is to public morals, than they would be in a civil case where a real person is alleging the works caused her own degradation or subordination. Nevertheless, the more important issue at present is whether the vague definition of pornography upheld by *Butler* and advocated by MacKinnon is in part responsible for the use of the law to disproportionately target gay and lesbian materials.

B. *Is MacKinnon's Legal Theory Inherently Problematic?*

To address the question raised by Strossen whether the targeting of lesbians and gays in Canada is an aspect of the "sex panic" fomented by MacKinnon and other antipornography feminists, it is necessary to explore whether the problems in Canada could be a manifestation of the inherent problem of using "the law" to solve the problems arguably caused by pornography. The following critiques of MacKinnon's work provide a framework for answering this question.

Carol Smart has observed that fitting feminists' concerns with pornography into a legal framework has necessarily resulted in the loss of many subtle insights and complexities.[189] Smart supports the concept of feminist jurisprudence but objects to "grand theorizing"[190] about all "women," rather than developing a feminist legal theory that encompasses differences among women. Smart's criticism of MacKinnon's approach is that instead

---

> adopted our civil (as opposed to criminal) approach to pornography; nor has Canada adopted any of the five civil causes of action we proposed (coercion, assault, force, trafficking, defamation). No such legislation has as yet even been introduced in Canada.

Catharine A. MacKinnon & Andrea Dworkin, Letter, *Canadian Customs Not Feminist*, 4 LAMBDA BOOK REP., Nov.-Dec. 1994, at 5.

Although this is true, MacKinnon misses an opportunity to bolster her credibility by acknowledging that this particular result of *Butler* was unanticipated and acknowledging the need for further clarification of the meaning of the terms "subordinating" and "degrading."

189. SMART, *supra* note 93, at 115. According to Smart, it is not enough to try to change existing laws; rather we must acknowledge the force of law within culture and then "begin to problematize, to challenge, and even to redefine law's supposedly legitimate place in the order of things." *Id.* at 12-13.

190. *Id.* at 71.

of challenging the place of law, it simply seeks to substitute one "truth" for another.[191]

Angela P. Harris has similarly criticized "gender essentialism," suggesting that both MacKinnon and Robin West inadvertently silence the voices of nonwhite women through their attempts to speak for all women.[192] Moreover, Harris rejects the idea that individuals have any one essential "self" and argues instead that we are composed of multiple "selves."

> A unified identity, if such can ever exist, is a product of will, not a common destiny or natural birthright. Thus, consciousness is 'never fixed, never attained once and for all'; it is not a final outcome or a biological given, but a process, a constant contradictory state of becoming, in which both social institutions and individual wills are deeply implicated. A multiple consciousness is home both to the first and the second voices, and all the voices in between.[193]

Harris emphasizes that although both authors are "steadfastly anti-racist," MacKinnon and West inadvertently silence other voices in their attempt to speak for all women.[194] That is, at times the urge to be all-inclusive can instead have the opposite effect and make invisible those whose lives differ from the particular point being made about "women."[195]

---

191. "It is unfortunate that working within the discourse of law seems to produce such tendencies — it is as if law's claim to truth is so legitimate that feminists can only challenge it and maintain credibility within law by positing an equally positivist alternative." *Id.*

192. *See* Harris, *supra* note 100, at 585.

193. *Id.* at 584 (quoting Teresa de Lauretis, *Feminist Studies/Critical Studies: Issues, Terms, and Contexts*, *in* FEMINIST STUDIES/CRITICAL STUDIES 1, 8 (de Lauretis ed., 1986).

194. Harris observes that women of color are less likely than white women to perceive gender identity as primary.

> A personal story may also help to illustrate the point. At a 1988 meeting of the West Coast 'fem-crits,' Pat Cain and Trina Grillo asked all the women present to pick out two or three words to describe who they were. None of the white women mentioned their race; all of the women of color did.

Id. at 604. Thus, it is to be expected that women of color would not always see gender discrimination as of paramount importance simply because it is present.

195. Throughout her article, Harris cites other feminists who have made this point. *See, e.g.*, BELL HOOKS, AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM (1981); BELL HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER (1984); ELIZABETH V. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT (1988); Marlee Kline, *Race, Racism, and Feminist Legal Theory*, 12 HARV. WOMEN'S L.J. 115 (1989); AUDRE LORDE, *Age, Race, Class, and Sex: Women Redefining Difference*, *in* SISTER OUTSIDER, at 114 (1984).

In 1991, MacKinnon defended her theory against this line of criticism. Catharine A. MacKinnon, *From Practice to Theory, or What is a White Woman Anyway?*,

Harris argues that black women can help move feminism beyond essentialism "through the recognition that wholeness of the self and commonality with others are asserted (if never completely achieved) through creative action, not realized in shared victimization."[196] To overcome the drawbacks of essentialism, feminism must be "strategic and contingent, focusing on relationships, not essences."[197] Harris makes clear that the commitment to creative action which is vital to strengthening feminism[198] can be frightening because it can mean foregoing "the comfort of shared experience" and instead creating new self-definitions.[199]

Harris' argument that feminists must recognize women's capacity for power, and hence moral responsibility, is directly relevant to the feminist debate over pornography and should be kept in mind to keep the focus on the concrete harm of sexual violence. Not only does her insight reinforce the importance of considering issues of consent in context, it points to the inadequacy of MacKinnon's insistence that pornography is exclusively about "male" domination of "women," notwithstanding her recognition that male and female are social constructs, not biological inevita-

---

4 YALE J.L. & FEMINISM 13 (1991). MacKinnon incorrectly interprets the criticism of her theory as suggesting that there is no such thing as oppression "as a woman." She claims that "to argue that oppression 'as a woman' negates rather than encompasses recognition of the oppression of women on other bases, is to say that there is no such thing as the practice of sex inequality." *Id.* at 20.

Thus, instead of responding to the criticism of essentialism, MacKinnon puts forth a more intense version of it. In the process, she makes forceful points about the varied forms of gender discrimination, but never really addresses the separate problem of the implications for issues left out of her arguments.

196. Harris, *supra* note 100, at 612.

197. *Id.* Harris continues:

> One result will be that women will be able to acknowledge their differences without threatening feminism itself. In the process, as feminists begin to attack racism and classism and homophobia, feminism will change from being only about 'women as women' (modified women need not apply), to being about all kinds of oppression based on seemingly inherent and unalterable characteristics.

Id.

198. *Id.* at 615.

199. This insistence on the importance of will and creativity seems to threaten feminism at one level, because it gives strength back to the concept of autonomy, making possible the recognition of the element of consent in relations of domination, and attributes to women the power that makes culpable the many ways in which white women have actively used their race privilege against their sisters of color.

Id. at 613-14. (citations omitted).

bilities.[200] As Carol Smart has written, "MacKinnon sees no division between law, the state, and society. For here [sic] these are virtually interchangeable concepts—they are all manifestations of male power."[201] According to Smart, MacKinnon gives too much authority both to the law[202] and to male power over women.[203]

In giving too much authority to the law and to male power, MacKinnon overlooks the places within both where change is possible. It is thus logical that this flaw would lead to flaws in the

---

200. In FEMINISM UNMODIFIED, *supra* note 5 at 146-62, MacKinnon distinguishes the feminist critique of pornography from traditional obscenity law by noting, "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." *Id.* at 147. In a footnote, she clarifies what she means by male dominance.

> "Male," which is an adjective here, is a social and political concept, not a biological attribute; it is a status socially conferred upon a person because of a condition of birth. As I use "male," it has nothing whatever to do with inherency, preexistence, nature, inevitability, or body as such. Because it is in the interest of men to be male in the system we live under (male being powerful as well as human), they seldom question its rewards or even see it as a status at all.

Id. at 263 n.6. The trouble is that if actual men take advantage of the social construct of male dominance it becomes very difficult to tell the difference in MacKinnon's writing between when she is criticizing the social construct and when actual men.

201. SMART, *supra* note 93, at 81.

202. Smart agrees with MacKinnon that the law powerfully silences women, but she sees it as "far less powerful in transforming society to meet the various needs of all women." *Id.*

203. Lynne Segal has also criticized Dworkin and MacKinnon for ascribing too much power to male heterosexuality. She notes that images of male domination and female subordination may seem to ratify male authority over women, adding:

> But we must be cautious in assuming an equation between such sado-masochistic discourse and people's lived experience of sexuality. Internal and external meanings are not always identical. Our experiences do not simply mirror social meanings; though they are inevitably filtered through them. We must tread very carefully if we wish to tease out the connections between the nature and significance of many layers of sexual and bodily experience for both women and men. These include the subjective of psychic experience of sex from infancy onwards; the cultural ideas and values surrounding sex; the social contexts allowing or forbidding sexual expression; the medical and other social practices applied to the body — particularly women's bodies — all of them taking place within the wider context of gender hierarchy. The place to begin . . . is recognition of the cultural force of the equation of "the phallus" with power — solid and unlimited.

LYNNE SEGAL, SLOW MOTION: CHANGING MASCULINITIES, CHANGING MEN 209 (1990). Segal argues that in reality most men do not feel that they have all the power in heterosexual relationships. *Id.* at 211.

remedy which emerges from her theory. Specifically, in light of the Canadian experience, it is important to explore whether something inherent in her proposed legislation could be modified to make the legislation capable of preventing sexual abuse without restricting sexual expression that does not cause harm. In other words, can it be formulated in a way that would prevent it being used in the service of homophobia or paternalism? An analysis of some critiques of the legislation will suggest the direction where a solution to this complicated problem may be found.

C. *Some Critiques of MacKinnon's Approach to Pornography*

In his article *Exploring the Limits: Feminism and the Legal Regulation of Gay Male Pornography*, Carl F. Stychin criticizes the antipornography approach put forth by MacKinnon and Andrea Dworkin because of its failure to differentiate between heterosexual pornography and gay male pornography.[204] Stychin does not take issue with their assessment of how pornography works to perpetuate women's inequality.[205] He regards their approach as perhaps valid for women but inapplicable to gay male pornography.

For Stychin, the problem with MacKinnon and Dworkin's definition of pornography is not that it presents a necessarily false description of how pornography defines sexuality. His objection is that their proposed ordinance lists actionable representations and then simply adds that "[t]he use of men, children, or transsexuals in the place of women" also constitutes pornography.[206] "Thus, the civil rights approach under a constitutional guise of neutrality completely subsumed gay male pornography."[207] Stychin argues that gay male pornography functions as resistance to dominant male culture and is therefore entitled to constitutional protection as political speech.[208] Stychin criticizes the "categorical nature of the feminist antipornography ap-

204. Carl F. Stychin, *Exploring the Limits: Feminism and the Legal Regulation of Gay Male Pornography*, 16 VT. L. REV. 857 (1992).

205. "The ingenuity and novelty of their approach lies in their linkage of sexual oppression, dominance by individual males, sexuality, and pornography. In their approach, male dominance becomes the dominance of individual women by individual men." *Id.* at 858.

206. *Id.* at 864 (citing ANDREA DWORKIN & CATHARINE A. MACKINNON, PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY 101 (1988)).

207. *Id.*

208. *Id.* at 858.

proach"[209] which necessarily posits male sexuality as the problem. He quotes Judith Butler for the proposition that dividing gender into (male) subject and (female) object positions simply reproduces the system it is trying to invert: "[T]he effort to identify the enemy as singular in form is a reverse discourse that uncritically mimics the strategy of the oppressor instead of offering a different set of terms."[210] Like Smart and Harris, Stychin maintains that MacKinnon's articulation of a "women's" viewpoint, does not — could not — represent the views of all women, and further assumes that there is only one "male" point of view.[211]

Stychin considers the antipornography civil rights law proposed by MacKinnon and Dworkin to be "a logical response to the anti-pornography feminists' theory: if pornography objectifies women, then it necessarily denies them those essential human attributes accorded to the individual male subject. Consequently, pornography not only denies but encourages denial of women's civil rights as autonomous individuals."[212] Thus, in Stychin's view, the creation of a civil rights cause of action, which can be brought by individuals, is necessarily within the "liberal" framework.

Stychin does not argue that the feminist antipornography approach should simply include the gay male point of view. Instead, he urges a "liberatory" approach to regulating pornography. "A shift from a liberal to a liberatory approach demands a rethinking of *all* universalizing concepts in light of the differing political experiences of the subjects."[213] His approach "defends

209. *Id.* at 879.

210. *Id.* at 882 (quoting JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 13 (1990)).

211. Lynne Segal also rejects the idea that there is a single male point of view implicated in representations of sexual aggression. She cites Carol Clover for the proposition that male movie viewers identify with the female protagonists in "rape-revenge" movies such as *I Spit on Your Grave* (1977) and *The Accused* (1988) and that if *all* viewers are not able to identify with the victimized women, "the revenge part of the drama can make no sense." SEGAL, *supra* note 171, at 292-94 (citing CAROL CLOVER, MEN, WOMEN AND CHAINSAWS: GENDER IN THE MODERN HORROR FILM 159 (1992)). Segal concludes, "Clover thus gives us every reason to rethink the truisms of gender, showing why the suggestion that men, as a sex, are motivated solely by sadistic aggression is simply a new way of affirming what it pretends to deplore." *Id.* at 294. Segal's conclusion does not offer a suggestion for what we can do about men who *are* motivated by sadistic aggression and whose aggression may be reinforced by violent pornography. Her insight does, however, suggest that what we do about representations of sexual aggression must take into account that they can have more than one meaning.

212. Stychin, *supra* note 204, at 863.

213. *Id.* at 897.

gay pornography not from a liberal rights viewpoint of free expression, but from a liberationist viewpoint."[214] Stychin is less interested in protecting gay pornography for the sake of individual consumers than in protecting it as a vehicle for expanding the sexual and political rights of gay men in general.

Under Stychin's proposal, gay pornography would be protected as political speech and regulation would focus on "employment standards rather than moral sanction."[215] Safe sex would be represented in pornography for the sake of the message it would send as well as to maintain safety in the work environment. Finally, a liberatory approach would provide for greater participation of sexual minorities in the production and control of the industry.

Stychin's criticism of MacKinnon parallels Angela Harris' in that he provides another example of how the desire to be inclusive (adding "men, children and transsexuals" to a definition of pornography that seeks to protect women) can lead to the unintended effect of obscuring differences rather than encompassing them within the proposed solution to a problem. His critique suggests that a definition of pornography that cannot account for the fact that representations of gay men in pornography *can qualitatively change* the meaning of the representation is fundamentally flawed. It can neither be expected to prevent sexual abuse of gay men that may be caused by pornography nor protect male sexual expression that does not function as sexual abuse.

Tamara Packard and Melissa Schraibman make a point similar to Stychin's, but from a lesbian perspective.[216] They argue that representations of lesbians in pornography cannot be assumed to be simply reproducing heterosexual male dominance.[217] They do not reject MacKinnon's views entirely; they build on them:

---

214. *Id.* at 871.

215. *Id.* at 898.

216. Tamara Packard & Melissa Schraibman, *Lesbian Pornography: Escaping the Bonds of Sexual Stereotypes and Strengthening Our Ties to One Another*, 4 UCLA WOMEN'S L.J. 299 (1994).

217. "By conceptualizing all sexual interaction within a heterosexual framework, MacKinnon ignores lesbians, whose sexuality exists at the margins of dominant culture. It is especially at these margins that feminists can claim and use self-determination and sexuality to free themselves from heterosexist, exploitive, oppressive constructs." *Id.* at 309.

> By focusing on MacKinnon's idea that gender is constructed, not natural, we begin to understand how crucial context is in the interpretation of ideas presented by any given representation of women. When we take the constructing and reflecting tool of pornography away from the context of male power and use it within the lesbian community, images of lesbian sexuality that would seem to ape heterosexual men and women immediately displace and reorder those images of gender and sexuality.[218]

Packard and Schraibman argue that even representations of sadomasochism, rape scenes and incest fantasies can, in a lesbian context, allow women to gain control over difficult issues.[219] They propose that the way to counter men's appropriation of women's sexuality through pornography is the creation of more lesbian pornography representing subversive points of view.[220]

The analysis put forth by Packard and Schraibman adds yet another reason for formulating an approach to pornography that allows for different meanings to be ascribed to the same types of representations, depending on their context. However, it does not necessarily suggest a need for categorical constitutional protection for all lesbian and gay pornography. Ann Scales, who identifies herself as a supporter of the MacKinnon/Dworkin pornography ordinance,[221] specifically cautions against such an approach:

> Within [a] radical feminist analysis, the fact that sexually explicit materials are gay and lesbian does not automatically exempt them from regulation under *Butler*. Pornography exists only in the context of a gendered society, which equates male-

---

218. *Id.* at 310.

219. As the authors explain:

> This is true within a lesbian context because power dynamics that exist between women differ from those that exist between men and women. It is easier to explore the operation of power in scenes between women (acted out or fantasized) than in a heterosexual context because in the latter context the man carries with him socially constructed power, privilege, and credibility, as well as physical power. In a lesbian context, the power dynamics are not necessarily as clear and entrenched.

Id. at 312.

220. *Id.* at 327-28.

> We will wait forever if we wait for men to release their grasp on female sexuality. Through our sexual empowerment, we can change sexuality and gender as we know it. As men have shown women, pornography is a powerful tool in making and transforming women's sexuality. We should subvert it for our own empowerment.

Id. at 326-27.

221. Scales, *supra* note 184, at 359.

> ness with domination and femaleness with subordination, maleness with objectification and femaleness with the objectified. Though the genders may be rearranged in gay and lesbian pornography, if the turn-on requires domination and subordination, then those materials affirm the social hatred of women.[222]

Scales has worked on a case brought by a Vancouver gay and lesbian bookstore against Canadian Customs,[223] challenging the agency's seizures of gay and lesbian materials. In her article *Avoiding Constitutional Depression: Bad Attitudes and the Fate of* Butler,[224] she presents arguments for why most, but not all, of the lesbian materials at issue in that case deserve constitutional protection.[225]

The challenge addressed by Scales is to explore some of the reasons why lesbian pornography would deserve constitutional protection.

> [Since *Butler*] we have an opportunity to explain how *being* lesbian is such an outsider status that we have often found our identity in non-conformity, subversion and daring. However, we therefore also have an obligation to distinguish among expressions of our sexual practices that are potentially harmful to women and those that are not.[226]

Scales presents four considerations relevant to the contextualization of lesbian sexual materials. The first is that unlike mainstream, heterosexual pornography, "the lesbian 'erotica' industry is not an industry at all,"[227] but exists in opposition to mainstream pornography.[228] This makes the type of marginalized material traditionally protected under a constitutional theory that seeks to protect minority views from government oppression. Second, lesbian materials tend to have a different content, in that

---

222. *Id.* at 365.

223. Little Sisters Book and Art Emporium v. Canada (Minister of Justice), Vancouver Registry no. A901450 (B.C.S.C.), filed June, 1990.

224. Scales, *supra* note 184.

225. I am not saying that all of those materials *should* be protected. Indeed, I have come to the firm conclusion that insofar as any of the lesbian materials present a risk of harm to women, they are obscene, and prohibited under Canadian law. Any apparent equivocation in what follows is because of my concern that the risks of harms from the lesbian materials could be different, and because, given rampant homophobia, even the same harms would be identified and evaluated differently.

Id. at 356.

226. *Id.* at 372.

227. *Id.* at 373.

228. *Id.* at 375.

they tend to condemn sexual exploitation of women by men, to present models as equals, to promote safe sex and to avoid the racism pervasive in mainstream pornography.[229] Third, Scales notes that she has seen no evidence that lesbian pornography causes sexual violence, although she acknowledges a lack of study in this area.[230] Lastly, some materials produced by the lesbian community for lesbians are liberatory in that they provide a sense of community and support for lesbians,[231] although here Scales also expresses concern about lesbians buying into the objectification of women.[232] Scales makes clear that each of her four considerations contains "political ambiguities and empirical indeterminacy,"[233] which is even more reason, she argues, for judging all sexual materials in context.[234]

Scales' proposal represents a strategy that potentially could be applied to all pornography. The analysis would require examination of content and context, and truly would incorporate women's multiple perspectives. However, her belief in the capacity of a law formulated as under *Butler* to protect women without trampling the rights of sexual minorities may be overly optimistic. That is, even if the United States Supreme Court were to uphold a law similar to that struck down in *Hudnut*, it would exist within the context of a system of laws that specifically precludes protection of lesbian and gay rights.[235] Thus, it is unrealistic to expect judges within the United States legal system to consistently enforce a law restricting pornography in a manner

---

229. *Id.* at 375-77.

230. *Id.* at 377-79.

231. *Id.* at 379-81.

> It is a psychological imperative particularly for young lesbians to have access to other lesbians as they go through the mental torture of recognizing and valuing *themselves*, not to mention the ordeals of "coming out." Most young lesbians simply muddle through, in solitude and pain, with little exposure or access to lesbian culture. It is as if each of us has to re-invent lesbian existence out of thin air, which, in contrast to societal support for some other sexualities, is an experience of gross discrimination and humiliation.

Id. at 381.

232. *Id.*

233. *Id.* at 382.

234. "I am urging that contextualization in adjudication include attention to the emerging prospects, as well as the historical circumstances, of disadvantaged groups." *Id.*

235. For a discussion of the law's hostility toward lesbians, see, *e.g.*, Robson, *supra* note 132. On the inability of legal notions of privacy in matters of sexuality to protect lesbians, see RUTHANN ROBSON, LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW 63-71 (1992).

that would protect lesbian and gay rights, unless that law were formulated to provide clear guidelines on its interpretation.

VI. Some Other Approaches to Ending Sexual Violence

The argument that it is misguided to blame pornography for sexual violence has also recently been put forth by Carlin Meyer, who suggests that focusing on misogyny only as represented in pornography reinforces the notion that the sexual is sinful.[236] Meyer's position is that because courts, juries, and citizens are conditioned to notice and condemn public displays of sex but not displays of sexism, "the anti-sex message is bound to dominate."[237] Meyer argues that such bias makes it more important to shift the debate from obscenity to degradation. She asserts that to encourage the public to focus on sex discrimination, "feminists would have to recognize that a depiction's tendency to foster or reinforce misogyny does not depend on whether sex is explicitly on view, but rather on the viewpoint expressed and likely to be understood as dominant when taken in the context of its (likely) consumption."[238] Meyer believes that although pornography "may *reflect* a dominant viewpoint, it plays a relatively unimportant role in the creation or reinforcement of it,"[239] especially in comparison to mainstream media, including sports imagery.[240] Therefore, Meyer urges feminists to engage in more speech by increasing criticism of mainstream media rather than attempting to suppress pornography.[241]

Meyer's emphasis on the need to focus on the viewpoint expressed is sound, but her conclusion suffers from the same drawback as Strossen's. It implies that it is not possible to focus on the viewpoint expressed and reach a conclusion that a work of sexual expression with a misogynist viewpoint has caused harm.

---

236. Meyer, *supra* note 1, at 1110.

237. *Id.* at 1119.

238. *Id.* at 1120. Like Strossen, Meyer concedes that there are limited contexts in which suppression is appropriate (citing Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fl. 1991)).

239. *Id.* at 1135 n.164.

240. Meyer notes that the annual swimsuit edition of *Sports Illustrated*, an example of less explicit mainstream imagery that epitomizes what antiporn feminists criticize, is now available on video as well as in print, and in 1989, had advertising sales of over $15 million, video sales of $5 million, and calendar sales of $4 million. *Id.* at 1166 n.313 (citing David Lieberman, *SI's Swimsuit Issue: More than Meets the Eye*, Bus. Wk., Jan. 16, 1989, at 52).

241. *Id.* at 1199.

Here again, it is helpful to distinguish the symbolic and tangible effects of applying the law to this problem. Obviously, in this context Meyer is referring to the generalized harm of spreading misogynistic ideas throughout society, which does not lend itself easily to legislative remedies because of the difficulties Meyer describes. However, when a woman can show direct personal harm, it would be easier to link the misogynistic message of the expression to the harm suffered.[242]

If Strossen and Meyer are correct that the fault of anti-pornography legislation is its emphasis on sex rather than violence, then perhaps an alternative approach will be use of the civil cause of action recently created by the Violence Against Women Act[243] for victims of crimes of violence motivated by animus based on the victim's gender. Under this Act, anyone found to have deprived another of the right to be free from gender-motivated violence may be held liable for compensatory and punitive damages, as well as injunctive and declaratory relief.[244] This legislation logically separates violence and sexuality by focusing instead on the concept of "gender-motivated" violence. However, to the extent that the Violence Against Women Act is used to vindicate the rights of women who have been sexually abused, it remains necessary to prove that an act of sexual vio-

242. Marianne Wesson has argued that lawsuits seeking damages for harm caused by violent pornography can be filed now, under existing tort law, without the need for legislation setting forth a cause of action and without infringing on anyone's right to free speech. Marianne Wesson, *Girls Should Bring Lawsuits Everywhere . . . Nothing Will Be Corrupted: Pornography as Speech and Product*, 60 U. CHI. L. REV. 845 (1993). Such lawsuits would in effect become part of the marketplace of ideas and would only restrict pornographers' speech to the extent that they would cease publishing materials shown to cause harm, because they would be required to pay for that harm.

243. The Violence Against Women Act was Title IV of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994). It enacted numerous provisions designed to protect women from violence, including the creation of new federal criminal offenses for violent crimes committed in violation of protection orders; provisions to strengthen state enforcement of protection orders; new rights for battered immigrant women; and a strengthening of the federal rape shield law.

244. Section 40302 of the Violence Against Women Act, the "Civil Rights Remedies for Gender-Motivated Violence Act," is codified at 42 U.S.C. § 13981. For a discussion of the civil rights cause of action, see W.H. Hallock, Note, *The Violence Against Women Act: Civil Rights for Sexual Assault Victims*, 68 IND. L.J. 577 (1993) (examining the ways the Act could help prevent violent sex discrimination and discussing various possible civil rights claims that could be brought under it); Brande Stellings, Note, *The Public Harm of Private Violence: Rape, Sex Discrimination and Citizenship*, 28 HARV. C.R.-C.L. L. REV. 185 (1993) (arguing that sexual violence is not just a crime but a deprivation of women's civil rights).

lence, such as rape, is based on gender-animus.[245] Such a requirement leads right back into the quagmire of whether sex and violence are one and the same in this society.[246] In other words, to be able to end sexual violence against women, we cannot avoid the need to examine the relationship between sex and violence, which is why the debate over pornography will continue as long as sexual violence continues.

CONCLUSION

Working to alleviate the harm of misogynistic sexual expression requires attempting to prevent both its causes and its effects, through an ongoing dialogue over which is which. It is difficult, but not impossible, to identify expressions of hatred when sexual expression is explored in its context. Perhaps as we become bet-

245. *See, e.g.*, Lynne Henderson, *Getting to Know: Honoring Women in Law and in Fact*, 2 TEX. J. WOMEN & L. 41, 71-72 (1993) (noting that rape may not be considered a crime motivated by gender bias because most rape statutes are written in gender-neutral language); Wendy Rae Willis, Note, *The Gun is Always Pointed: Sexual Violence and Title III of the Violence Against Women Act*, 80 GEO. L.J. 2197 (1992) (criticizing the civil rights section of the Act for conforming to state rape laws with their existing problems for women trying to prove non-consent and discussing the difficulties women may have in proving that a sexual assault was gender-motivated).

246. Not surprisingly, this is another situation in which Strossen and MacKinnon are diametrically opposed. For Strossen, "[R]ape is not a crime about sex, but rather, about violence." STROSSEN, *supra* note 3, at 261 (citing SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN, AND RAPE (1975); SUSAN ESTRICH, REAL RAPE (1987)). For MacKinnon, sex and violence are not so easily distinguished. "To reject forced sex in the name of women's point of view requires an account of women's experience being violated by the same acts both sexes have learned as natural and fulfilling and erotic, since no critique, no alternatives, and few transgressions have been permitted." MACKINNON, FEMINISM UNMODIFIED, *supra* note 5, at 161. MacKinnon has also insisted that she does not maintain that "all sex is rape" but rather has consistently argued that "sexuality occurs in a context of gender inequality." Catharine A. MacKinnon, *Pornography Left and Right*, 30 HARV. C.R.-C.L. L. REV. 143, 143-45 (1995) (reviewing EDWARD DE GRAZIA, GIRLS LEAN BACK EVERYWHERE: THE LAW OF OBSCENITY AND THE ASSAULT ON GENIUS (1992); RICHARD A. POSNER, SEX AND REASON (1992)).

Joyce Carol Oates' observation that in pornography, "our most valuable human experience, love, is being desecrated, parodied, mocked," *supra* note 94, may shed some light on this question. Perhaps for women who equate sex with love, it is almost sacrilegious to admit that it can co-exist with violence. If this is the case, then it may make sense to reformulate the argument that rape is an act of violence, not sex, into one that insists that rape is an act of hate that has nothing to do with romantic love. Like rape, much pornography has nothing to do with love, although it may be that the desecration of love helps to ease the pain of a life without love. Unlike rape, however, it can be difficult to tell when pornography is expressing hatred or love, which is a good argument for limiting regulation of it to matters involving safety in its production.

ter able to distinguish expressions of hatred and love in sexual expression, we will be better able to identify when sexual expression causes harm. Then, perhaps we can formulate a legal approach to pornography that makes actionable expression that functions as a tool to keep women out of schools, jobs or their chosen neighborhoods, or from exercising any other constitutional right.

If feminism is to provide a theory which articulates and addresses harm caused through sexual expression, that theory must be flexible enough to accommodate many different perspectives. In developing this theory, we must also examine the question of to what extent generalizations can be made about the interaction of sex and violence in all communities in the country. The ramifications of such generalizations have been explored in discussions of domestic violence,[247] which is, after all, violence in the context of a sexual relationship. In this way, a feminist legal theory of pornography can also operate as part of the effort to eradicate all forms of oppression.

247. *See, e.g.*, Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1260 (1991) (discussing efforts made during a Senate debate on a measure to challenge the notion that domestic violence only happens in minority communities and arguing that such efforts politicize the problem in the dominant community but deflect attention from the problem as it exists in minority communities).