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ESSAY

EROTICISM, OBSCENITY, PORNOGRAPHY AND FREE SPEECH

*Nicholas Wolfson**

INTRODUCTION

Modern society speaks about sex, Michel Foucault observes, "*ad infinitum*, while exploiting it as *the secret*."¹ As he pointed out, we attempt to explain virtually everything about us in terms of sex. We "bring [ourselves] almost entirely—our bodies, our minds our individuality, our history—under the sway of a logic of concupiscence and desire."²

Sexual depiction, in the forms modern society terms "pornography" or "obscenity," is a multi-billion dollar industry.³ It is also the object of regulatory concern by the government and important movements in society.⁴ The debate about pornography begins with one fundamental question: what is it?⁵ The hotly disputed answers inevitably turn on sometimes violently contrasting notions of the good and evil life.⁶ Pornography *is* a running debate about issues deep in the human psyche, issues more fundamental than virtually all of the political topics that

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¹ MICHEL FOUCAULT, 1 *THE HISTORY OF SEXUALITY: AN INTRODUCTION* 35 (Robert Hurley trans., 1978).

² *Id.* at 78.

³ *Despite U.S. Campaign, A Boom in Pornography*, N.Y. TIMES, July 4, 1993, at A20.

⁴ *Id.*

⁵ See James Lindgren, *Defining Pornography*, 141 U. PA. L. REV. 1153, 1156 (1993).

⁶ Lynn Hunt, *Introduction to THE INVENTION OF PORNOGRAPHY* 13 (Lynn Hunt ed., 1993).

constitute core first amendment debates.⁷

Many religious conservatives and many feminists believe they can both define and justifiably condemn pornography. Their reasons often differ, but they agree that pornography lacks intellectual or aesthetic merit, or imposes hurt to the level that demands abrogation of first amendment protection for pornographic speech. Their ideological opponents argue that what some would decry as harmful "porn" is occasionally either great art or at least may be a positive contribution to sexual freedom and liberation.⁸

In American constitutional law, pornography, whatever it is, is not identical to obscenity. Obscenity is a legal term. It is the depiction of sexual conduct that appeals to the prurient interest, is patently offensive, and lacks serious value.⁹ Crudely put, it is repulsive sex that lacks value. The harm in obscenity is the damage it does to the traditional ordered moral fabric of society.¹⁰ What is moral or repulsive and what is of value are notoriously subjective and murky concepts. Obscene speech is not protected by the First Amendment.

Pornography, if it is anything, refers in some sense to the depiction of sexual organs or conduct.¹¹ The word "pornography" proliferated and gained fame as erotica which, despite previously appearing only in the libraries of the upper classes, began to be merchandised to the masses after the French Revolution. The response was official governmental censorship.¹²

Pornography includes material that may have serious

⁷ In an early obscenity decision, the Supreme Court asserted that sex is a "great and mysterious motive force in human life." *Roth v. United States*, 354 U.S. 476, 487 (1977).

⁸ See Steven G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 MICH. L. REV. 1564, 1580-81 (1988); see also 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 (1987).

⁹ *Miller v. California*, 413 U.S. 15, 24 (1973).

¹⁰ See Gey, *supra* note 8, at 1570-77. Justice Brennan, in the *Roth* obscenity case, made the morality principle clear when he pointed out (in justification for holding obscenity not protected) that as of 1792 all of the states had made blasphemy or profanity statutory crimes. *Roth*, 354 U.S. at 482-83.

¹¹ The word is derived from the Greek "pornographos," literally "writing about prostitutes". The word first surfaced in the *Oxford English Dictionary* in 1857, Hunt, *supra* note 6, at 13, and first appeared in a 1769 French treatise, called *Le Pornographe*, in reference to writing about prostitution. *Id.*

¹² Hunt, *supra* note 6, at 12-13.

value. As such, the definition of pornography is broader than that of obscenity. Although adult pornography is not definitively excluded from first amendment protection,¹³ the Supreme Court has decided that near-obscene speech is less equal than other categories of speech.¹⁴ Further, those who display pornography in the workplace are subject to civil prosecution under Title VII of the Civil Rights Act.¹⁵

This Essay examines the meanings of pornography, eroticism and obscenity. These terms are complex, vague and controversial. They merge into each other and reflect the differing and wildly controversial attitudes of different cultures and times. In the course of discussing these issues this essay attempts to demonstrate that the terms pornography, eroticism and obscenity involve a *dispute* about some of the deepest issues in the human condition. This dispute impacts on any consideration of the relationship between the First Amendment and words or pictures that are erotic or pornographic. This Essay suggests that, ironically, the reason courts do not protect the obscene (as defined by the Supreme Court), and give grudging protection to the near-obscene, is that these words and pictures involve concerns that are *immeasurably more important* than the mundane political issues that are customarily given full first amendment protection. Indeed, many distinguished thinkers suggest that pornography should lose its current first amendment protection because of the overwhelming evil significance, as they see it, of the issues presented by the use of pornography. The result of this type of pressure is ever-increasing censorship.

Part I begins with a brief review of the cultural and religious attitudes toward sex and sexual behavior in the West. It briefly sketches the contrasting attitudes of the ancient Greeks, Christianity and Judaism, and mentions some modern variations on the theme. This backdrop is designed to emphasize that the sexual behavior that society condemns (and therefore the art that depicts it), is a product of deep and conflicting

¹³ Child pornography is subject to extensive state regulation. See *New York v. Ferber*, 458 U.S. 747, 756 (1982).

¹⁴ See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976).

¹⁵ See *infra* notes 163-68.

cultural and religious constructs. Thus, an ancient Greek vase with erotic paintings of nudes that depict sodomy and masturbation might be considered pornographic today by certain religious groups, but clearly was celebrated and approved in that culture.¹⁶

Next, Part II discusses the rise of the modern concept of pornography as an object of official regulation in the West, which reached an apogee at the time of the French Revolution. During this period, pornography was a political weapon in the hands of opponents of repressive autocratic regimes. The politicization of this subject continues today. The essential modern nature of pornography is art or hack work (erotica) that is disapproved of by influential and powerful interests. When pornography is banned, it is an indication that these interests have won the debate by ending it.

Part III analyzes the formidable contemporary feminist argument that pornography is a male weapon used for the establishment and maintenance of a paternalistic society. This Essay concludes by suggesting that regulation of pornography (and obscenity) is a result of society's desire to choke off those viewpoints that it finds deeply and dangerously offensive—indeed, far more offensive than the usual political debate that the First Amendment traditionally protects. Pornography and obscenity are debates about issues so important that courts are disposed to limit the argument and limit free speech.

I. CULTURAL AND RELIGIOUS ATTITUDES TOWARD SEX

At the very outset, the term "pornographic" is problematic. Is a classic Greek nude statue pornographic? Are National Geographic videos showing animals copulating pornographic? Are *Romeo and Juliet*, with its explicit sexual jokes, or *The Taming of the Shrew*, with its depiction of a male dominating his future wife, to be considered pornography? Is the film industry, which continually depicts men and women in varying

¹⁶ RICHARD A. POSNER, SEX AND REASON 355-56 (1992). The public furor greeting U.S. Surgeon General Jocelyn Elder's tentative proposal to include discussion of masturbation in the AIDS-prevention curricula of public schools indicates the strength of the taboo surrounding this topic. See Douglas Jehl, *Surgeon General Forced to Resign by White House*, N.Y. TIMES, Dec. 10, 1994, at A1.

stages of undress or in simulated sexual acts, pornographic? Is the biblical story of Lot's daughters seducing him pornographic? If pornography is simply the more or less graphic depiction of sex or sexual organs, we have an impossibly broad category.¹⁷

Inevitably, society imposes normative constructs as it attempts to define pornography. Indeed, pornography is not a "thing" but an "argument" between institutions of the State and good and bad artists as to what is permissible in the realm of depiction of sexual behavior.¹⁸ As the Meese Commission observed, pornography "seems to mean in practice any discussion or depiction of sex to which the person using the word objects."¹⁹ Almost any frank depiction or even discussion of sex is likely to enrage some segment of society. Pornography is a concept that cannot be defined without taking a particular ideological, religious or moral position on fundamental views of life. Any attempted definition of pornography contains a philosophical viewpoint of what comprises an ethically acceptable society.

For example, in 1993, a reporter described the Iranian mobilization against "pop music and other horrors."²⁰ The article reported as immoral those who, among other things, listened to Western pop music, and women who wore lipstick or exposed strands of their hair.²¹ In the opinion of Iranian religious leaders, such conduct, and its depiction, will lead to prostitution and atheism. What is considered acceptable and, indeed, commendable in Western society is condemned in another society as pornographic. Although cultural relativism is no great surprise, sometimes its enormity is impressive.

¹⁷ Impossibly broad, that is, for certain "liberal" Western sensibilities; some conservative "puritanical" commentators may go that far. Some feminists may ban any depiction of sex that applauds male domination.

¹⁸ Hunt, *supra* note 6, at 11.

¹⁹ GORDON HAWKINS & FRANKLIN E. ZIMRING, *PORNOGRAPHY IN A FREE SOCIETY* 24 (1988) (quoting ATTORNEY GENERAL'S COMM'N ON PORNOGRAPHY, U.S. DEPT OF JUSTICE, FINAL REPORT 227-28 (1986)) [hereinafter COMM'N ON PORNOGRAPHY]. The Meese Commission pointed out that, in contrast, the term "erotica" is "employed to describe sexually explicit materials of which the user of the term approves." *Id.*

²⁰ Chris Hedges, *Mobilizing Against Pop Music and Other Horrors*, N.Y. TIMES, July 21, 1993, at A4.

²¹ *Id.*

The social dynamite inherent in the definition of pornography results from the picturing or description of sex. Inescapably, sex and desire are the subject and object of powerful religious and cultural forces. As Camille Paglia said, "Eros, like Dionysus, is a great and dangerous God."²² Society either permits or circumscribes sex and depictions of sex depending on the religious and political assertions of the harm (or lack of it) of certain practices.²³ It follows that different cultures will disagree as to what depicts sex (lipstick?), what is explicit sex (exposed strands of women's hair?), and the like. Put crudely, pornography is in the eye of the beholder.

The dispute over the definition of pornography involves the deepest views possible about the nature of the good (or evil) of society. Differences as to tax policy, free trade and the like pale before the stakes involved in alternative views about the definition of pornography. Inevitably, when a court, or other organ of the State, labels a painting, book or film as pornographic, it has made a fundamental, viewpoint-based judgment about speech. Since the First Amendment is designed, at the very minimum, to protect against viewpoint censorship, it is peculiar that obscenity is denied first amendment protection, and that near-obscenity frequently gets only diluted protection.²⁴ Perhaps sex actually is far more important than political speech and, hence, in the opinion of the Court, cannot be left safely to a free market of speech.

In modern Western society, the contours of permitted sexual practice are changing as notions of harmful sex are altered. In Iran, because of the supposed dangerous seductiveness of women but not men, women are allowed to

²² CAMILLE PAGLIA, *SEX, ART, AND AMERICAN CULTURE* 30 (1992).

²³ Perhaps the oldest examples of pornography found are ancient ivory female figures, 18,000 to 25,000 years old, which may be fertility symbols. John N. Wilford, "Venus" *Figurines from Ice Age Rediscovered in an Antique Shop*, N.Y. TIMES, Feb. 1, 1994, at C11.

²⁴ The author agrees with the banning of child pornography because it requires the sexual abuse of children. The scope of permissible regulation of child pornography is beyond the subject of this Essay. The Third Circuit discusses the types of images prohibited by federal child pornography laws in *United States v. Knox*, 32 F.3d 733 (3d Cir. 1994), cert. denied, No. 94-413, 1994 WL 512613 (U.S. Jan. 17, 1995). For an account of the political controversy surrounding *Knox*, see Linda Greenhouse, *Court Rejects Appeal of Man Convicted in Child Smut Case With Political Overtones*, N.Y. TIMES, Jan. 18, 1995, at D20.

appear in public only if swathed in black cloth. In the United States, however, women are relatively free to dress as they please. A few decades ago, sex in American films was limited to a chaste embrace. Today, sex is explicit. America seems awash with sex (and violence) in theatres, movies, novels, television and commercials for everything from automobiles to soap. Fifty years ago, there were established, "traditional" codes of behavior between women and men.²⁵ Sex outside the marriage bond was immoral.²⁶ Divorce was abnormal.²⁷ Sexual passion on the part of women was regarded with alarm, if not horror. Homosexuality was in the closet and judged to be deviant, immoral and criminal.²⁸

Today, due to the sexual revolution and the changing roles and status of women, gays and lesbians, the codes have changed radically and are in constant flux. The very definitions of sexuality for men and women are constantly being redefined. The value and definition of concepts of family, love, marriage and romance have become the subject of rancorous debate and controversy. For example, more children are now born out of wedlock.²⁹ Gay and lesbian life styles are celebrated in the dominant culture of theatre and art. Perhaps most significantly, feminists have directed our attention to the social, political and sexual subordination of women as a fundamental construct of relations between women and men.³⁰ Many feminists persuasively argue that rape, including date rape and marital rape, is endemic in our society.³¹ They assert that frequently what passes for sex is violence by men against women.³² Some women go so far as to view all heterosexual intercourse as a form of violent dominion of men over women.³³

²⁵ POSNER, *supra* note 16, at 54-66.

²⁶ POSNER, *supra* note 16, at 55.

²⁷ POSNER, *supra* note 16, at 55.

²⁸ POSNER, *supra* note 16, at 56, 60-66.

²⁹ In 1991, 68% of black children were born out of the marriage relationship. Charles Murray, *The Coming White Underclass*, WALL ST. J., Oct. 29, 1993, at A14. The figure for white children born out of wedlock has risen to 22%. *Id.*

³⁰ See CATHARINE A. MACKINNON, ONLY WORDS 3-8 (1993).

³¹ *Id.* at 7.

³² *Id.* at 114 n.3.

³³ Catharine MacKinnon writes that "the major distinction between intercourse (normal) and rape (abnormal) is that the normal happens so often that one can't

Religious conservatives are traditionalists in sexual matters (they do not, however, want to go back to the love of boys in fourth-century B.C. Greece). They take their religious scriptures seriously and literally. The nuclear family—mother, father, children—is central to the good life.³⁴ (In response, some political liberals are beginning to take the point, if not the lead, on this argument about the need for the family.³⁵) In their belief, marriage is more than a private relationship; it is the essential moral cement that binds together a healthy society. Sex is moral only in the marriage relationship. Lust is forbidden since it tends to breach the marriage bonds. Gay and lesbian sex is immoral and unnatural. Even heterosexual sex is suspect when divorced from the procreative purpose.

In the Catholic church, sex itself is suspect, even when related to marriage; hence, the clergy are celibate in order to follow higher pursuits. The Christian aversion to sex is well pictured in the following statements. Saint Augustine emphasized that we are "*inter faeces et urinam nascimur*" ("born between feces and urine").³⁶ Nietzsche stated, "Christianity gave Eros poison to drink. He did not die, but became vice."³⁷ George Bataille stated that "Christianity associated eroticism unambiguously with evil. What in paganism was only the momentary reversal of the course of things became the lot of the damned, the share that came under God's eternal curse."³⁸

For religious conservatives, even nudity is suspect; certainly they would argue that public displays of nudity are immoral (perhaps even private displays). George Bataille pointed out that not so long ago, Christian religious institutions required

get anyone to see anything wrong with it." Catharine A. MacKinnon, *A Feminist/Political Approach: Pleasure Under Patriarchy*, in THEORIES OF HUMAN SEXUALITY 65, 84-85 (James H. Gee & William T. O'Donohue eds., 1987).

³⁴ See GEORGE F. GILDER, MEN AND MARRIAGE 62-67 (1986); GEORGE F. GILDER, SEXUAL SUICIDE (1973).

³⁵ See Daniel P. Moynihan, *Defining Deviancy Down*, in 17 AM. SCHOLAR 62 (1993).

³⁶ GEORGE BATAILLE, 3 THE ACCURSED SHARE: VOL. II THE HISTORY OF EROTICISM 134 (Robert Hurley trans., Zone Books 1991) (1976).

³⁷ FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL 168 (R.J. Hollingsdale trans., 1973) (1886).

³⁸ GEORGE BATAILLE, *supra* note 36, at 134.

girls to enter bathtubs in long nightgowns.³⁹ As Allan Bloom wrote, discussing the historical differences between the Judeo-Christian tradition and the ancient Greeks on sexuality:

The Greeks' naked exercises, including those at the Olympic games, scandalized the Jews . . . but they also attracted many of their young. . . . But the gymnasia were not all that was objectionable about the Greeks. They were regarded as secondary emanations from their principal cause, Greek philosophy, which was quickly identified with Epicureanism, interpreted as the unbridled pursuit of pleasure. Among serious Jews, the very name Epicurus, in a Hebrew or Yiddish form, is still an ugly epithet.⁴⁰

Religious conservatives believe that eros is a powerful and dangerous (perhaps evil) force that must be severely disciplined and channelled into a sharply defined, acceptable path, the nuclear family.⁴¹ In orthodox Judaism, the family is central to Jewish life. Eros is bound up in the husband-wife relationship. As an orthodox rabbi recently wrote, "Judaism prohibits adultery, premarital sex, pederasty, bestiality and other activities that at least some subset of the population desires Compulsive sexuality—homosexual or heterosexual—is a mental disorder. . . . *Kiddushin*, the sanctity of marriage and of sexuality in marriage, is fundamentally violated by compulsive sexuality of any type."⁴² He further stated: "The family is our most important religious institution; a homosexual partnership is not a family."⁴³

The family was made primary in orthodox Judaism and sexuality outside of wedlock was condemned. A conservative Jewish writer asserted: "Judaism may be said to have invented the notion of homosexuality, for in the ancient world sexuality was not divided between heterosexuality and homosexuality. . . . Jews placed controls on sexual activity. It was to be sanctified . . . and placed in the . . . bed of husband and wife."⁴⁴ The great Moses Maimonides wrote that circumcision

³⁹ *Id.* at 437 n.8.

⁴⁰ ALLAN BLOOM, *LOVE AND FRIENDSHIP* 437 (1993).

⁴¹ POSNER, *supra* note 16, at 62.

⁴² Barry Freundel, *Two Views: Homosexuality and Halachic Judaism*, *MOMENT*, June 1993, at 40, 43. The rabbi was participating in a debate in which a non-orthodox Rabbi took issue with many aspects of his condemnation of homosexuality. *Id.*

⁴³ *Id.* at 44.

⁴⁴ Dennis Prager, *Judaism, Homosexuality and Civilization*, *MOMENT*, June

was designed "to limit sexual intercourse."⁴⁵ It "counteracts excessive lust," but does not "destroy the power of generation."⁴⁶ As he further explained, professional harlots were not tolerated in ancient Israel because they would tend to weaken family bonds.⁴⁷

Family is considered essential in Judaism because family members are united by love; they exist to help each other and to lessen the strife that inevitably accompanies the breakdown of the family. Maimonides stated that "we ought to limit sexual intercourse altogether, hold it in contempt, and desire it only rarely."⁴⁸ Homosexuality is forbidden since, "[i]f in the natural way the act is too base to be performed except when needed, how much more base is it if performed in an unnatural manner, and only for the sake of pleasure."⁴⁹ Maimonides tempered this, however, by saying that "we must keep in everything the golden mean; we must not be excessive in love, but must not suppress it entirely; for the Law commands, 'be fruitful, and multiply.'"⁵⁰ He pointed out that circumcision leaves the "natural faculty in full force, but is guarded against excess."⁵¹

If I may generalize, the Jews never endorsed asceticism, as did Christians; however, they fell far short of Greek and Roman sexual liberality.⁵² Despite some implications of Maimonides's statements, the Jews did not disapprove of sexual pleasure and, unlike the Catholic Church, they rejected celibacy.⁵³ Western Jews permitted polygamy up until the eleventh century, and Eastern Jews until the twentieth century.⁵⁴ Modern liberal Jews do not share Maimonides's sexology and many non-orthodox rabbis either welcome homosexuals into Judaism or, at least, currently are reconsidering the

1993, at 45.

⁴⁵ MOSES MAIMONIDES, *THE GUIDE FOR THE PERPLEXED* 378 (Michael Friedländer trans., 2d ed. 1910).

⁴⁶ *Id.*

⁴⁷ *Id.* at 373.

⁴⁸ *Id.* at 376.

⁴⁹ *Id.*

⁵⁰ MAIMONIDES, *supra* note 45 at 379.

⁵¹ *Id.*

⁵² POSNER, *supra* note 16, at 48.

⁵³ POSNER, *supra* note 16, at 49.

⁵⁴ POSNER, *supra* note 16, at 49.

meaning of the ancient taboos.⁵⁵

Modern conservatives who emphasize the value of sex in marriage do not rely solely on theological grounds, but rather they assert that women domesticate the wild nature of men in the marriage bond.⁵⁶ Thus, bachelors are far more likely than married men to live for a short term and neglect the "long horizons" of career and stability.⁵⁷ Ironically, some modern liberals have begun to adopt this argument in the face of the endemic violence in American culture.⁵⁸

In contrast, the classical Greeks did not view sex as inherently problematical.⁵⁹ Yet the Greeks did not view sex neutrally nor as always benign.⁶⁰ The concept of moderation⁶¹ and the distinction between the active and the passive were central to the Greek view of sex.⁶² The virtuous man—and the Greeks wrote books exclusively for men by men⁶³—modulated his quantity of sex. This was important as a method by which the good man created the proper balance in his life and the proper control over self. The man who could control himself was then, and only then, capable of exercising leadership over free citizens of the city-state.⁶⁴ Foucault, in his description of

⁵⁵ See Alice S. Alexiou, *The Jewish Community Uncomfortably Confronts Homosexuality*, MOMENT, June 1993, at 28-35.

⁵⁶ GILDER, MEN AND MARRIAGE, *supra*, note 34, 39-47. Maimonides, in effect, made this argument. See *supra* notes 45-51 and accompanying text.

⁵⁷ GILDER, WEALTH AND POVERTY 70-71 (1981).

⁵⁸ Recently, President Clinton gave a speech before the National Baptist Church Convention, in which he addressed the need to repair the nation's social fabric. To combat the rise in violence, the increasing number of children born out of wedlock, and the large percentage of pregnancies terminated in abortion, the President emphasized the need for a new, less tolerant attitude toward illegitimacy, abortion and single parenthood. He stated that the nation would be "better off" if more people were in a "stable, traditional family." Michael Vines, *In Baptist Talk, Clinton Stresses Moral Themes*, N.Y. TIMES, Sept. 10, 1994, at A1.

⁵⁹ See generally, MICHEL FOUCAULT, 3 THE HISTORY OF SEXUALITY: THE CARE OF SELF (Robert Hurley trans., 1988) [hereinafter FOUCAULT, SELF]; MICHEL FOUCAULT, 2 THE HISTORY OF SEXUALITY: THE USE OF PLEASURE (Robert Hurley trans., 1990) [hereinafter FOUCAULT, PLEASURE].

⁶⁰ The Greeks had similar attitudes toward diets; indeed they considered the two very similar in the sense that both areas required discipline and moderation. FOUCAULT, SELF, *supra* note 59, at 141; FOUCAULT, PLEASURE, *supra* note 59, at 51.

⁶¹ FOUCAULT, PLEASURE, *supra* note 59, at 44-45.

⁶² FOUCAULT, PLEASURE, *supra* note 59, at 46-47.

⁶³ FOUCAULT, PLEASURE, *supra* note 59, at 47.

⁶⁴ FOUCAULT, PLEASURE, *supra* note 59, at 80-86.

the ancient Greeks, quoted Aristotle as saying that "self-indulgent individuals exceed . . . in all these ways; they both delight in some things that they ought not to delight in, and if one ought to delight in some of the things they delight in, they do so more than one ought and than most men do."⁶⁵

The act of penetration also was central to the concept of activity and passivity in sex for Greek men.⁶⁶ The virtuous man was the man who was active, not passive in his sexual contacts, whether with boys or with women. The gender of his partner did not matter (with certain qualifications discussed below) so long as the man was the penetrator.⁶⁷ This active man also merited dominance in the world of politics.⁶⁸ If Foucault's history is correct, the classical Greek mix of sex and politics confirms feminist arguments about the systemic domination of women by men. The Greeks asserted that women were naturally subordinate and, hence, naturally passive, i.e., penetratees.⁶⁹ For this reason, the Greeks condemned lesbianism since it required, they believed, one of the female partners to take an active or masculine role; and that was considered unnatural.⁷⁰ Similarly, the Greeks approved of the missionary position because it expressed male superiority.⁷¹ (They apparently regarded the proper role of the worthy man as on the top, whether with boy, man or woman.)

The relationship between boy and man was applauded in ancient Greece. But the relationship had its inherent difficulties. Unlike the wife, the free-born boy later as an adult would become a leader in the family and the city-state. Hence, his relationship with his lover was one of more or less equals—unlike that of husband and wife—and was itself tricky.⁷² As a beloved, the boy ran the risk, if the relationship were consummated, of being the penetratee. Since this would place him in an ignoble position, the Greek philosophers and poets created intricate mating rituals to disguise his posi-

⁶⁵ FOUCAULT, PLEASURE, *supra* note 59, at 45.

⁶⁶ FOUCAULT, PLEASURE, *supra* note 59, at 46.

⁶⁷ FOUCAULT, PLEASURE, *supra* note 59, at 46.

⁶⁸ FOUCAULT, PLEASURE, *supra* note 59, at 220.

⁶⁹ FOUCAULT, PLEASURE, *supra* note 59, at 46.

⁷⁰ FOUCAULT, SELF, *supra* note 59, at 24-25.

⁷¹ FOUCAULT, SELF, *supra* note 59, at 23.

⁷² FOUCAULT, PLEASURE, *supra* note 59, at 220-21.

tion.⁷³

The young Greek boy who openly expressed desire was suspect. He was to consent to the act only in the guise of offering a sort of assistance to the ardor of the adult lover. The adult lover who desired consummation was desiring an act that put into question the future leadership role of the boy. Therefore, the better relationship involved an idealistic non-sexual adult lover, who sought to educate his beloved, rather than to place his hand beneath the boy's tunic. For instance, Socrates, the lover of the Good, was lauded for his asceticism and his denial of the carnal inducements of the great Alcibiades.⁷⁴ Hence, the ideal man-boy relationship was one that facilitated the search for the true and the beautiful.⁷⁵ What in practice occurred in these relationships we do not know, since we have theories and myths but no empirical data.⁷⁶

Homosexuality as we know it today, although suspect, was not the subject of great interest or moral concern.⁷⁷ Since it was ignoble to take the passive role in the sex act, the adult male relationship was troubling.⁷⁸ (The Greeks apparently could not easily conceive of relationships of sexual equality between adult males.) There was no concept among the Greeks that paralleled our modern bipolarity of sexuality—that is, our distinction between heterosexuality and homosexuality.⁷⁹ As mentioned, the Greeks distinguished between the penetrator and the penetratee; sameness of gender was not an issue.

In the fourth century before the Common Era, the Greeks extolled the relationship between man and boy. The conjugal relationship was expressed in severely male dominant aspects. The wife (often in her teens when married) was controlled by

⁷³ FOUCAULT, PLEASURE, *supra* note 59, at 224-25.

⁷⁴ FOUCAULT, PLEASURE, *supra* note 59, at 241-42

⁷⁵ FOUCAULT, PLEASURE, *supra* note 59, at 242-46.

⁷⁶ Certainly, Aristophanes emphasized the heterosexual nature of the ancient Greeks. His women brought an end to war by withholding their love in his play *Lysistrata*. The women in that great play seem more like the powerful women Camille Paglia describes than the mechanistic individuals Michel Foucault describes. See ARISTOPHANES, *LYSISTRATA* (Douglass Parker trans., 1964).

⁷⁷ FOUCAULT, PLEASURE, *supra* note 59, at 195.

⁷⁸ FOUCAULT, PLEASURE, *supra* note 59, at 194.

⁷⁹ FOUCAULT, PLEASURE, *supra* note 59, at 187-88.

the husband.⁸⁰ Sex between them was a method of creating heirs for the elites, and marriage was a method of preserving and passing on property.⁸¹ (The poor did not write about themselves or anything.) Needless to say, the husband was free to take male or female lovers, and slaves of either sex were always fair game. The wife was expected to be faithful. Her principal "right" was to be free from the presence of a rival woman in the home.⁸²

During a gradual evolution of the marriage concept in the first centuries of the Common Era,⁸³ philosophers began to argue that the relationship between husband and wife was more important and more satisfactory than that of man to boy.⁸⁴ Elite opinion began to emphasize reciprocal relationships and notions of equality (including fidelity) in the marriage relationship.⁸⁵ The dangers of sex received greater emphasis, yet never reached the Christian notions of inherent evil.⁸⁶ The man-boy love relationship, however, continued to be accepted and to be lauded in elite opinion, and the man continued to dominate the marriage relationship.

This discussion of Greek and Roman sexuality relies on Foucault's famous histories of sexuality. The relevance of sexual power relationships is characteristic of Foucault's general methods and ideology in other fields. His works are characterized by the argument that beneath the appearance of reason or biology exists the reality of power relationships constituting all societal forms. Paglia will have none of that.⁸⁷ She pointed out that many Greek and Roman men "found both women and boys desirable but that boys' sexual attractiveness ended when they sprouted a beard and body hair."⁸⁸ She asserted that "there is an aesthetic issue here, vividly documented from Archaic monody through Roman satire, in praise of the girlish rosiness, smoothness, and glow of boys' flesh."⁸⁹ But, Foucault

⁸⁰ FOUCAULT, PLEASURE, *supra* note 59, at 154-57.

⁸¹ FOUCAULT, PLEASURE, *supra* note 59, at 152-57.

⁸² FOUCAULT, PLEASURE, *supra* note 59, at 164-65.

⁸³ FOUCAULT, SELF, *supra* note 59, at 189-92.

⁸⁴ FOUCAULT, SELF, *supra* note 59, at 209-10.

⁸⁵ FOUCAULT, SELF, *supra* note 59, at 148-49.

⁸⁶ FOUCAULT, SELF, *supra* note 59, at 107, 113.

⁸⁷ PAGLIA, *supra* note 22, at 182.

⁸⁸ PAGLIA, *supra* note 22, at 182.

⁸⁹ PAGLIA, *supra* note 22, at 182.

speaks of sex only in the language of power and subordination. Sexuality is reduced to the "ethos of penetration and domination."⁹⁰ Paglia described this as a "display of old-maidish puritanism," a "scholarship reduced to *Mad* magazine parody."⁹¹ As she sarcastically summarizes it: "All those Greeks banging away had no idea they were having sex without sexuality. They were merely discoursing on power, you see."⁹² Paglia mocked Foucault's notion that women and boys were merely passive objects—"just sperm spittoons."⁹³ She derided Foucault's implication that women then (or now) are always victims: "His attempt to make the body the passive property of male society is an evasion of the universal fact so intolerable to him: that we are all born of human mothers. By turning women into ciphers of men, he miniaturizes and contains them."⁹⁴ As she elegantly stated, "Foucault sees power everywhere except where it is greatest; the female principle."⁹⁵

Paglia's criticism of Foucault⁹⁶ is remarkably similar to that of the distinguished European philosopher, Jürgen Habermas, who faulted Foucault for ignoring the complexities and nuances of human relationships, including sexuality. As he puts it, Foucault has leveled "ambiguous phenomena,"⁹⁷ ignoring the magic and mystery and biology (as well as culture) inherent in sexuality. Similarly, another European philosopher, Jean-Francois Revel, recounted how Foucault, in a conference devoted to analyzing Soviet dictatorship, argued that the conferees were ignoring the Gulag that was the West. Russian representatives to the meeting, who had had experience with the real Gulag, could not contain their amazement at his

⁹⁰ PAGLIA, *supra* note 22, at 182.

⁹¹ PAGLIA, *supra* note 22, at 182.

⁹² PAGLIA, *supra* note 22, at 182.

⁹³ PAGLIA, *supra* note 22, at 182.

⁹⁴ PAGLIA, *supra* note 22, at 230.

⁹⁵ PAGLIA, *supra* note 22, at 230.

⁹⁶ Professor Joan Breton Connelly of New York University recently has advanced a startling new theory of the famous Parthenon frieze that has gained the interest of classical scholars. She argues that the frieze (the central monument of classical culture) celebrates the heroism of women. This interpretation challenges the view that Athens was a misogynistic society. See Steven Coates, *A Feminist Theory of Greece's Parthenon Frieze*, WALL ST. J., Jan. 6, 1994, at A10.

⁹⁷ JÜRGEN HABERMAS, *Some Questions Concerning the Theory of Power: Foucault Again*, in THE PHILOSOPHICAL DISCOURSE OF MODERNITY 266, 291 (Fredrick Lawrence trans., 1991).

reductionism of everything in the West to brute coercive power.⁹⁸

Whatever one may think of Paglia's critique, it is obvious that, unlike with the ancient Greeks and Romans, the man-boy erotic relationship is extremely problematical in modern Western society. This relationship has even been criminalized. Few today would write, as did Aristophanes in his play "The Birds," of a dissident longing for freedom from the oppressive city and its laws:

I long for a place
Where a father of a boy in the bloom of youth
Will blame me for doing an injustice;
"It's a fine thing that you did to my son, Stilbonides,
Meeting him all bathed, leaving the gymnasium,
You did not kiss him, speak to him, embrace him,
Or grab his testicles".⁹⁹

Bloom argued that the "Bible teaches us an intense but severely limited eroticism,"¹⁰⁰ one limited to the nuclear family. Perhaps Bloom wrongly described this eroticism as "intense." For the Greeks, "the erotic ties were more diffuse and . . . concentrated less on fidelity than on the quest for the beautiful, wherever it may be found."¹⁰¹ (Of course, the philosophers also may have been justifying their occasional reach under the boy's tunic.) This does not mean, necessarily, that the Greeks emphasized (at least in theory) the carnal. On the contrary, Alcibiades complained that, try as he might to seduce Socrates, he failed. Plato viewed Eros as an education in the pursuit of the Good.¹⁰²

In contrast to Foucault's emphasis on sex as an empirical example of power, Bataille defined eroticism as a temporary return to nature, involving a "dialectic of prohibition and transgression."¹⁰³ Men and women became distinguished as

⁹⁸ JEAN-FRANCOIS REVEL, *DEMOCRACY AGAINST ITSELF: THE FUTURE OF THE DEMOCRATIC IMPULSE* 94 (Roger Kaplan trans., 1993).

⁹⁹ BLOOM, *supra* note 40, at 444 (footnote omitted).

¹⁰⁰ BLOOM, *supra* note 40, at 443.

¹⁰¹ BLOOM, *supra* note 40, at 442.

¹⁰² IRIS MURDOCH, *METAPHYSICS AS A GUIDE TO MORALS* 342-46 (1992).

¹⁰³ JURGEN HABERMAS, *Between Eroticism and General Economics: Georges Bataille, in THE PHILOSOPHICAL DISCOURSE OF MODERNITY*, *supra* note 97, at 211, 233.

human when they turned away from nature. Animals have no repugnance for excrement, filth or sex in whatever form, place or time. Although men and women became human when they erected sacred taboos and prohibitions, in the pagan world a momentary return to unlimited sex, including the orgy, was permitted as a temporary "reversal of the course of things."¹⁰⁴ "Sensuous excess"¹⁰⁵ provided "access to the sacred"¹⁰⁶ in some mysterious fashion. In response, Christianity and Judaism viewed the prohibitions as absolute. Christianity totally divided eros (evil) from the religious. While the pagan world linked the religious and the sexual, "Christianity associated eroticism unambiguously with evil."¹⁰⁷ Bataille asserted: "In fact, these elements [taboos and prohibitions] were an inducement, and we have seen that eroticism owes its value to the distaste we have for the animality of sex."¹⁰⁸ He emphasizes that the "horror" of taboo transgression plays an essential role in Eros.¹⁰⁹ Eros is attractive because it "uses up our strength and our resources and, if necessary, places our life in danger."¹¹⁰

Bataille argues that norms are binding because we believe them to be sacred and they are enticing because of the experiences of sacrilege felt when we violate them.¹¹¹ He believes that modern religion is responsible for having severed the link between the sacred and the profane. Bataille further asserts that modern, industrialized, capitalistic life has led to a vitiation of the sacred, an emasculation of eroticism, and a kind of attenuation of the sense of divine terror and anxiety that was closely allied to primitive religion. If eroticism properly re-emerges it can create a new exuberance and vitality that will lead to a form of economics based upon plenty rather than

¹⁰⁴ BATAILLE, *supra* note 36, at 134.

¹⁰⁵ HABERMAS, *supra* note 103, at 232.

¹⁰⁶ HABERMAS, *supra* note 103, at 232.

¹⁰⁷ BATAILLE, *supra* note 36, at 134.

¹⁰⁸ BATAILLE, *supra* note 36, at 134.

¹⁰⁹ BATAILLE, *supra* note 36, at 104.

¹¹⁰ BATAILLE, *supra* note 36, at 104. Indeed, eroticism is connected in some mysterious manner to primitive anxieties and taboos about death. The death of the old paves the way for the emergence of the young, and sex is involved in the transmission of new life to replace the dying. *Id.* at 97-101.

¹¹¹ HABERMAS, *supra* note 103, at 231.

scarcity, on life-enhancing activity rather than war.¹¹²

II. THE RISE OF MODERN CONCEPTS OF PORNOGRAPHY

Many societies have included portrayals of various forms of eroticism, including the explicit depiction of sexual organs and acts. But the modern notion of pornography as a distinct regulatory category seems to have arisen subsequent to the 1500s and was solidified in the eighteenth and nineteenth centuries as a product of the democratization of erotic art and literature.¹¹³ Before the advent of the printing press and widespread literacy, erotic art and literature was largely confined to the upper classes. Aristocrats and intellectuals kept and examined sexually explicit writings and paintings in "secret museums."¹¹⁴ As education spread and as the new industry of printing developed,¹¹⁵ money could be made by the sale of the illicit to the so-called lower classes. The ruling classes viewed this development with great alarm. They sought to regulate it, to keep it out of the reach of the lower classes. Lynn Hunt wrote, "In other words, pornography as a regulatory category was invented in response to the perceived menace of the democratization of culture."¹¹⁶ "Pornography developed out of the . . . push and pull between the intention of authors . . . to test the boundaries of the 'decent' and the aim of the . . . police to regulate it."¹¹⁷ She further stated:

As Kendrick argued, the concept of pornography was historically shaped, and its development as a category was always one of conflict and change. Pornography was the name for a cultural battle zone: 'pornography' names an argument, not a thing." Obscenity has ex-

¹¹² HABERMAS, *supra* note 103, at 232-35.

¹¹³ Hunt, *supra* note 6, at 10-14.

¹¹⁴ Hunt, *supra* note 6, at 12 (citing WALTER KENDRICK, *THE SECRET MUSEUM: PORNOGRAPHY IN MODERN CULTURE* (1987)).

¹¹⁵ Soon after Gutenberg developed the press, pornography made use of the new technology. A book of "erotic engravings" was published in 1524 and censored by the Pope. John Tierney, *Porn, the Low-Slung Engine of Progress*, N.Y. TIMES, Jan. 9, 1994, § 2, at 18. Tierney describes how pornography has quickly exploited advances in media technology. One of the first movies, an Edison movie, was named "The Kiss." *Id.* In 1978 and 1979, over 75% of videocassettes sold were pornographic. *Id.* Interactive computer technologies promise a new resource for the ultimate in pornographic experience. *Id.*

¹¹⁶ Hunt, *supra* note 6, at 12-13.

¹¹⁷ Hunt, *supra* note 6, at 10.

isted just as long as the distinction between private and public behavior, yet around the middle of the nineteenth century, according to Kendrick, something changed in the balance between obscenity and decency, private and public, and pornography emerged as a distinct governmental concern.¹¹⁸

There is arguably one major distinction between pornography today and pornography as it existed from the year 1500 to the end of the French Revolution. During those three centuries, pornography frequently was linked with political and religious change and revolution. Political and literary subversives used pornography as an effective weapon against the aristocracy, monarchy and clergy. In France, for example, Marie Antoinette was portrayed in drawings and writings as a debauchee who gave herself to everyone, including her son. The King was depicted in explicit drawings and books as impotent and in general as a figure of sexual comedy and depravity. Similar pornographic portraits were written and painted about nobles and clergy.¹¹⁹

Women frequently were presented in pornography of this era as feisty and emancipated. But there was no real equality in gender treatment. Indeed, Hunt emphasized: "Democracy was established against monarchy through pornographic attacks on the feminization of both the aristocracy and monarchy. It was accelerated in and after 1789 by especially vicious attacks against the leading female figure of the ancien régime, the queen herself."¹²⁰ Hunt concluded that "[w]omen were thus essential to the development of democracy and, in the end, excluded from it."¹²¹ As she wrote, Julie, heroine of a famous pornographic work, passed from man to man and in the end "retired from political life to raise children and tend her garden."¹²²

The French Revolution marked an end to the uses of pornography as a political vehicle for an attack on the old regime. Political success seemed to free up pornography for its modern use as a purely sexual vehicle.¹²³ Political freedom liberated

¹¹⁸ Hunt, *supra* note 6, at 13 (footnote omitted).

¹¹⁹ Lynn Hunt, *Pornography and the French Revolution, in THE INVENTION OF PORNOGRAPHY*, *supra* note 6, at 301, 302.

¹²⁰ Hunt, *supra* note 119, at 329.

¹²¹ Hunt, *supra* note 119, at 329.

¹²² Hunt, *supra* note 119, at 329.

¹²³ As Hunt put it, "Pornography would continue to have political and social

the presses, and writers and publishers discovered they could make profits on apolitical pornography, which concentrated on the depiction of sex for sensual purposes. During this era, the ideology of a separate, private sphere for women began to develop. Traditional differences between men and women were emphasized. Yet pornography frequently dismissed the differences between the sexes in matters of sexuality.¹²⁴ Hunt argued that as "new biological and moral standards for sexual difference evolved, pornography seemed to become even more exotic and dangerous. It had to be stamped out."¹²⁵ The old regime wanted to censor pornography because of its subversive, indecent political message. Newer regimes wanted to eliminate it because of its attacks on traditional notions of moral decency. In either case, pornography embodied the conflict between the commercial and artistic goals of good and bad artists, and the security and morality concerns of the governmental authorities.¹²⁶

III. FEMINIST OPPOSITION TO PORNOGRAPHY AS AN EXPRESSION OF MALE DOMINATION

Foucault argued that the ancient Greeks defined "proper" sex as the male playing the active role and the female the passive. In the eighteenth century, pornography was used as a weapon in a political battle against the ancien régime. More recently, Professor Catharine MacKinnon has argued that modern pornography is the subordination of women played out in written or visual scenes of graphic sexual behavior.¹²⁷ Whereas French revolutionaries used pornography to help eliminate what they perceived as the "feminization of the monarchy," MacKinnon would use censorship of pornography to attack the masculine domination of society. In both cases por-

meanings, as it still has[,] . . . but these would now be much less intentional and much more subtle . . ." Hunt, *supra* note 118, at 339. See *infra* notes 127-47 and accompanying text for a discussion of Professor MacKinnon's argument that pornography is a not-so-subtle political weapon of male-dominated society.

¹²⁴ Kathryn Norberg, *The Libertine Whore: Prostitution in French Pornography from Margot to Juliette*, in *THE INVENTION OF PORNOGRAPHY*, *supra* note 6, at 225, 251.

¹²⁵ Hunt, *supra* note 6, at 45.

¹²⁶ Hunt, *supra* note 6, at 10.

¹²⁷ MACKINNON, *supra* note 30, at 20-27.

nography is linked to politics.

For MacKinnon, pornography is a political weapon in the hands of the ruling masculine hierarchy; dismantle it, and women achieve political and social equality. Where graphic depictions of sex involve equal treatment of gender, in MacKinnon's view, it is not pornography. She and her colleague Andrea Dworkin¹²⁸ drafted the famous anti-pornography ordinance passed by Indianapolis,¹²⁹ which defined pornography in terms of female subordination. The ordinance was struck down by the Court of Appeals for the Seventh Circuit on first amendment grounds.¹³⁰

MacKinnon comes out of an intellectual background that asserts the primacy of language.¹³¹ She also is influenced by structuralist theories of determinism, which see human events as determined by the "hidden structures of society."¹³² In MacKinnon's view, the underlying structure is the institution of male domination, and its totalitarian control is implemented and constituted by the language of paternalism. Language is the metaphysical reality that determines the being of men and women. First there is the word, then everything else follows. Language, MacKinnon asserted, is the tool by which powerful males dominate and construct reality.¹³³ Thus, we live in a male-dominated world, she asserted, in which the depiction of sex is almost inevitably symbolic and illustrative of the physical and spiritual hegemony of the male. Pornography is the "graphic sexually explicit subordination of women, whether in pictures or in words," by which women are dehumanized as sexual objects and, therefore, become subject to rape and mutilation.¹³⁴ Much of what MacKinnon would forbid already is

¹²⁸ See ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (3d ed. 1981).

¹²⁹ See DONALD A. DOWNS, *THE NEW POLITICS OF PORNOGRAPHY* 95-143 (1989).

¹³⁰ *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986). The ordinance, in part, defined pornography as "the graphic sexually explicit subordination of women, whether in pictures or words." *Id.* at 324.

¹³¹ See JÜRGEN HABERMAS, *Beyond a Temporalized Philosophy of Origins: Jacques Derrida's Critique of Phonocentrism*, in *THE PHILOSOPHICAL DISCOURSE OF MODERNITY*, *supra* note 97, at 161.

¹³² PAUL JOHNSON, *MODERN TIMES: THE WORLD FROM THE TWENTIES TO THE EIGHTIES* 695 (1983).

¹³³ See generally MACKINNON, *supra* note 30.

¹³⁴ *American Booksellers*, 771 F.2d at 324 (quoting from the Indianapolis version

covered by obscenity laws criminalizing repulsive sex, which lacks serious artistic merit. MacKinnon would also ban pornography, however, no matter how great the alleged artistic or literary value of the work, if the message is subordination of women.¹³⁵ By this definition, Shakespeare, as well as the local "hard-core" porn-king, would share in the stain of pornography.

MacKinnon asserted that she is not simply arguing that pornography causes harm. Since language is the creator of our reality, the old distinctions between language and conduct are superficial.¹³⁶ The language of pornography is *itself* subordination and discrimination against women.¹³⁷ Language, MacKinnon asserted, is society, is culture, is the soul of the individual. Pornographic language is the ultimate harm. It is even more powerful than physical acts of subordination since it constitutes the bigoted "hard-wiring" of the male soul and mind.¹³⁸ Because of the power of sex itself, pornography is even more insidious than racist speech.¹³⁹ It constructs the self and society. Language creates female subordination and perpetuates it. Hence, government censorship of pornography is essential to ending the subordination of women. Indeed, since speech is more powerful than conduct (it is a kind of conduct with a powerful ideational and emotive kick added to it), the First Amendment is perverse. That which should be *most* regulated is speech. Conduct, which is almost always derivative of speech, is less important as a governing principle of society.

Naturally MacKinnon's emphasis on language as central to the institution of male domination is a much-disputed proposition. Wendy Kaminer wrote: "I like to think words have power but I know they don't cast spells."¹⁴⁰ Paglia colorfully assert-

of the MacKinnon/Dworkin anti-pornography ordinance).

¹³⁵ MACKINNON, *supra* note 30, at 22.

¹³⁶ MACKINNON, *supra* note 30, at 21-22.

¹³⁷ In this regard her position has received general support from the Supreme Court. See *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367 (1993) (abusive speech in the workplace may constitute illegal discrimination under Title VII of the Civil Rights Act).

¹³⁸ MACKINNON, *supra* note 30, at 61.

¹³⁹ MACKINNON, *supra* note 30, at 61-62.

¹⁴⁰ NATIONAL COALITION AGAINST CENSORSHIP, *THE SEX PANIC: WOMEN, CENSORSHIP AND "PORNOGRAPHY"* 7 (1993) [hereinafter *THE SEX PANIC*].

ed that “[i]t is positively idiotic to imagine that there is no experience outside of language.”¹⁴¹ Professor Henry Louis Gates, Jr. eloquently argued that the “pendulum has swung from the absurd position that words don’t matter to the equally absurd position that only words matter.”¹⁴² Therefore, he asserted, MacKinnon concentrates her energies on censorship, rather than on campaigns to eliminate substantive inequalities.

Many feminists also dispute MacKinnon’s argument because they disagree that women are always the victim.¹⁴³ Indeed, they maintain that by using the law selectively to protect women, MacKinnon’s thesis tends to perpetuate women’s status as victims.¹⁴⁴ They vigorously assert that sexual speech should be protected, and that women and men should battle what they believe is harmful pornography with speech, rather than with censorship. Leanne Katz, executive director of the National Coalition Against Censorship, argued that MacKinnon’s thesis will aid the censors of the political right.¹⁴⁵ She pointed out that, after MacKinnon’s theories were adopted by the Canadian Supreme Court in 1992,¹⁴⁶ lesbian, gay and feminist materials were banned under the “harm” standard espoused by the MacKinnon approach. Even Andrea Dworkin’s books were seized, although after media uproar they were released. As Katz explained, “Most feminists know that campaigns to suppress sexual expression have often been used to control *women’s* sexual expression: to limit access to information about reproduction, sexual attitudes and practices, art or education.”¹⁴⁷ In an amicus brief challenging the MacKinnon anti-pornography ordinance in Indianapolis,¹⁴⁸ the Feminist Anti-Censorship Task Force wrote:

The range of feminist imagination and expression in the realm of sexuality has barely begun to find voice. Women need the freedom

¹⁴¹ PAGLIA, *supra* note 22, at 214.

¹⁴² HENRY L. GATES, JR., *Is the First Amendment Racist?: Why Civil Liberties Pose No Threat to Civil Rights*, NEW REPUBLIC, Sept. 20, 1993, at 37-49.

¹⁴³ See HAWKINS & ZIMRING, *supra* note 19, at 167-68.

¹⁴⁴ See THE SEX PANIC, *supra* note 140, at 6-9.

¹⁴⁵ Leanne Katz, *Censors’ Helpers*, N.Y. TIMES, Dec. 4, 1993, at A21.

¹⁴⁶ *Butler v. Her Majesty*, 89 D.L.R.4th 449 (Can. 1992).

¹⁴⁷ Katz, *supra* note 145, at 21.

¹⁴⁸ *American Booksellers Ass’n v. Hudnut*, 771 F.2d 323, 323 (7th Cir. 1985), *aff’d*, 475 U.S. 1001 (1986).

and the socially recognized space to appropriate for themselves the robustness of what traditionally has been male language. Laws such as the one under challenge here would constrict that freedom.¹⁴⁹

MacKinnon's analysis assumes that individuals are "malleable automatons"¹⁵⁰ and that individual women cannot withstand the structural forces of sexism and sexist language. Lawrence J. Siskind, a first amendment litigator, has put it well:

In academic circles, the concept of free will is considered quaint. Ideas have a way of filtering down from ivory towers to the rest of society.

The jury verdicts in the Reginald Denny case were based, in part, on the idea that the defendants did not have free will, that they were caught up in the frenzy of violence . . .¹⁵¹

If human beings are simply "impressionable victims of their environment," then the First Amendment irresponsibly exposes such "receptacles to the array of exciting and disturbing influences that an unregulated environment generates."¹⁵² Although at times humans may not think as critically as academics would hope, such a concept of ourselves as blank slates lacking free will is unacceptable as a basis for banning pornography.

As bold as MacKinnon's analysis seems, it is not, in reality, different from that of censors of the past. Societies have always recognized the dangers of speech. Even before the lessons of postmodern theories of structuralism and language, societies knew of the revolutionary capabilities of speech and reacted by censoring it. Soon after Gutenberg invented the printing press and, thus, created the dangers of mass distribution, officials created the first censorship bureaucracy.¹⁵³ Perhaps pornography helped bring down the French ancien régime and more effective censorship would have lengthened its existence. Similarly, the Spanish Inquisition argued that blasphemous speech and thought threatened the salvation of the immortal soul. Given their religious assumptions about the true

¹⁴⁹ NAT HENTOFF, *FREE SPEECH FOR ME—BUT NOT FOR THEE* 352 (1992).

¹⁵⁰ Lawrence J. Siskind, *The Folly and Futility of Censoring Violence*, *LEGAL TIMES*, Nov. 22, 1993, at 28, 29.

¹⁵¹ *Id.* at 29.

¹⁵² *Id.* at 29.

¹⁵³ RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 338 (1992).

faith and the value of the soul, censorship and burning were considered well worth it.

Certainly an immortal soul in need of saving was as important then as feminist emancipation is today. Although blasphemy may not be at the very top of the list of harmful speech in the modern industrialized Western world, in other countries it is still strongly prohibited. American conservatives in the 1940s and 1950s argued that communist speech would lead to the horrors of the totalitarian state. Given what we know now about the murderous tendencies of communist regimes, their censorious zeal was an eminently rational construct.

No government censors speech that it views as harmless. Harm is at the root of first amendment controversy. MacKinnon has not invented a new concern. The First Amendment has bite only if it protects speech that is harmful, otherwise it is not worth the bother. For this reason, in the past the Supreme Court has ruled that "offensive" speech is protected.¹⁵⁴ To preserve popular support for the First Amendment, however, a distinction between immediate and remote harm must be made. Also, the magnitude of the harm feared should be taken into account. Finally, some distinction should be made between a harm that is unlawful—such as speech that directly results in murder—and harm that is political, social and problematical—such as the alleged harm that may result from speech that leads to protectionism.¹⁵⁵ If we dilute these distinctions, then we merge speech with conduct (which governments always regulate based on harm concerns) and justify pervasive censorship.

The problem is not new. As Zechariah Chafee, Jr. wrote in

¹⁵⁴ See, e.g., *Cohen v. California*, 403 U.S. 15 (1971).

¹⁵⁵ The Meese Commission argued that aggressive forms of pornography have a relationship to sexually violent behavior. Two researchers who had been cited by the Commission stated:

"Despite the [Meese Commission's] report that most forms of pornography have a causal relationship to sexually aggressive behavior, we find it difficult to understand how this conclusion was reached. . . .

"Most social scientists who testified before the commission were also cautious . . . when making statements about causal links between pornography and sexually aggressive behavior. *Any reasonable view of the research would not come to the conclusion . . . that pornography conclusively results in antisocial effects.*"

HENTOFF, *supra* note 149, at 347.

1949, the traditional "clear and present danger test" is designed to work some practical line of distinction between immediate and remote harmful acts.¹⁵⁶ Libertarian philosophers will not convince the public, or the Court, to protect all speech, regardless of the magnitude or proximity of the harm. The recurrent problem, as Chafee said, is the "problem of Mark Anthony's Oration—discussion which is calculated to produce unlawful acts without ever mentioning them."¹⁵⁷ Given the types of harm society fears, the clear and present danger test may fail. Walter Berns wrote in 1965:

The first thing to remember [about the clear and present danger test] is that Schenk was sent to jail with it. The second is that Abrams and Gitlow, with Holmes dissenting in ringing clear and present danger language, were jailed despite it. The third is that [the communists in Dennis] . . . were sent to jail with it. . . . The clear and present danger test has been of assistance only to a Jehovah's Witness—not to a Socialist like Debs or a Communist like Gitlow or Dennis, or to anyone else whose views are both hated and feared.¹⁵⁸

Today's Court, however, influenced by the *Brandenburg* doctrine, which requires a kind of immediate physical harm to trigger exceptions to the First Amendment, might have decided these cases differently. Obscenity is not protected by the First Amendment. The harm it creates is to the traditional moral fabric of society. Obviously, this is not a discrete, immediate, unlawful and physical kind of harm, as contemplated in *Brandenburg*.¹⁵⁹ It is not a specific harm to a private individual, as in the case of defamation, another exception to first amendment protection.¹⁶⁰ Society so fears the culturally constructed concept of obscenity harm that legislatures ban it altogether and courts refuse to apply the clear and present danger test to it.¹⁶¹

Like most censors, including supporters of obscenity censorship, McKinnon identified (albeit more eloquently than

¹⁵⁶ Zechariah Chafee, Jr., *Book Reviews*, 62 HARV. L. REV. 891, 898-99 (1949) (reviewing ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948)).

¹⁵⁷ *Id.* at 899. Or, one might add, orations that do mention them!

¹⁵⁸ WALTER BERNS, *FREEDOM, VIRTUE AND THE FIRST AMENDMENT* 50, 55 (1969).

¹⁵⁹ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

¹⁶⁰ *See New York Times Co. v. Sullivan*, 376 U.S. 255 (1964).

¹⁶¹ *See Miller v. California*, 413 U.S. 15 (1973).

most) her most dreaded harm—sexual subordination of women—and argued that pornographic speech maintains and reinforces subordination. MacKinnon viewed the traditional obscenity doctrine as identifying a noxious, conservative notion of harm that is oblivious to the inequality of women and is embraced by a paternalistic society.¹⁶² Conservative moralists, naturally, do not agree with that assessment. Nevertheless, their fears and hers overlap to a degree, and they agree on a fair amount—such as in supporting the Indianapolis anti-pornography ordinance.¹⁶³ Sometimes the censors' evaluations of risk of harm are correct, sometimes not. If we decide not to take that risk, we censor. The rationale of the First Amendment is that the benefit of free speech is well worth the risk.

CONCLUSION

This brief Essay on pornography, obscenity and eroticism cannot provide even an incomplete history of the subject. But it does begin to reveal the mystery and magic that sex plays in human life. It suggests why the Supreme Court has, from the beginning of its deliberations on the subject, placed obscenity outside the protection of the First Amendment. Sex, the Court believes, is too important to trust to the John Stuart Mill orthodoxies of free minds freely searching for the truth and for individual fulfillment. That liberal mantra is acceptable for trade policy, and the like, but not for the truly important subject of sex. Although some, like Justice Brennan, would grant certain first amendment protection to the obscene,¹⁶⁴ the Court as an institution has always decided that repulsive sex, lacking serious merit, is not worthy of protection. The explanation for this reluctance to protect is not based on obscenity's or pornography's appeal to the non-cognitive. It is not because, as some argue, pornography is merely a masturbatory aid and not a form of expression. Almost no one, for example, doubts that the First Amendment protects poetry that appeals to the emotions, rather than to logic.

¹⁶² MACKINNON, *supra* note 30, at 87-91.

¹⁶³ DOWNS, *supra* note 129, at 95-143.

¹⁶⁴ See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 83, 94, 111 (1973) (Brennan, J., dissenting); see also *Miller*, 413 U.S. at 48.

The explanation lies in the Court's fear (shared by religious conservatives) that pornography (the sexual depiction they abhor) is a particularly powerful form of expression that will create a sexual "big bang" out of which will emerge a new universe radically different from the traditional Judeo-Christian sexual culture.¹⁶⁵ Out of this expression will emerge, some fear, a world of homoerotic love, man-boy love, incest, sadomasochistic sex, sexual violence and destruction of the traditional family, where Madonna will be monarch.¹⁶⁶ Many believe that world is already here.

Feminists like MacKinnon have a different slant; not entirely (they fear the violence, as do conservatives), I believe, but still different. They view sex as the most important instrument of power in culture and society. As stated, MacKinnon argues that pornography is speech that creates and maintains a savage male-dominated society. Hence, the obscene category, as legally defined, is useless since it ignores the subordination theme. Pornography, when defined as graphic sexual expression that subordinates women, is the crucial concept and, defined as such, would chill pornographic art no matter how great the artist who creates it. Erotica that attacks the traditional family is acceptable to MacKinnon as long as it observes the principle of sexual equality. Thus, MacKinnon identified a different harm from that of traditional "obscenity moralists." In both views, however, the sexual component evokes fears so great as to call for censorship (frequently with success).

MacKinnon's argument is consistent with, indeed, organically part of, the philosophy that infuses the two Supreme

¹⁶⁵ In *Paris Adult Theatre I*, then-Chief Justice Burger upheld a ban on obscene movies: "[T]here is a 'right of the Nation and of the States to maintain a decent society.'" 413 U.S. at 59-60 (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting)). He also quoted Professor Bickel: "It concerns the tone of the society, the mode, or to use terms that have perhaps greater currency, the style and quality of life, now and in the future." *Id.* at 59.

¹⁶⁶ In *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), Chief Justice Rehnquist, delivering the judgment of the Court, stated:

The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals In *Paris Adult Theatre I v. Slaton*, we said:

"In deciding [*Roth v. United States*, 354 U.S. 476 (1957)], this Court implicitly accepted that a legislature could legitimately act on such a conclusion to protect 'the social interest in order and morality.'"

Id. at 569.

Court decisions on "hostile" work environments. In 1986, the Court decided that illegal sexual harassment under Title VII of the Civil Rights Act of 1964 includes conduct or speech that is "sufficiently severe or 'pervasive to alter the conditions of [the victim's] employment and create an abusive working environment.'"¹⁶⁷ The revolutionary concept was that "pure speech" would suffice to trigger the violation. In 1993, in its second opinion on the subject, the Court attempted to clarify that test.¹⁶⁸ The Court decided that female plaintiffs do not have to undergo "psychological injury" to prevail in litigation.¹⁶⁹

The net result of these decisions is that an enormous hole was punched in the basic doctrine that merely offensive speech is protected by the First Amendment.¹⁷⁰ Now, offensive speech that subjects women to male sexual domination in the workplace, if potent enough,¹⁷¹ is actionable.¹⁷² Pornography in the workplace, where it operates to discriminate against women, now receives drastically reduced levels of first amendment protection. Given the size of the hole punched in the ban against offensive speech, it is doubtful that it can be long restrained to the workplace. Pornographic speech everywhere that tends to reduce women to subordination, or maintain them in that status, is now constitutionally vulnerable to statutes that chill it. After all, if *discrimination* in employment is the acceptable mantra that validates censorship of harmful words, then words that tend to create sexual discrimination in other areas—such as in clubs, political action, the universities,

¹⁶⁷ *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986) (quoting *Hensen v. Duretees*, 682 F.2d 897, 904 (1982)). Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(a)(1). *Meritor* made it clear that the statutory language encompasses harassing, sexually discriminatory speech.

¹⁶⁸ *Harris v. Fork Lift Sys., Inc.*, 114 S. Ct. 367 (1993).

¹⁶⁹ *Id.* at 370-71.

¹⁷⁰ Jeffrey Rosen, *Fast Food Justice*, N.Y. TIMES, Nov. 16, 1993, at A27.

¹⁷¹ The Court stated that there cannot be "a mathematically precise test." *Harris*, 114 S. Ct. at 371. The factors include "frequency," "severity," "whether it is physically threatening or humiliating, or a mere offensive utterance," and "whether it unreasonably interferes with an employee's work performance." *Id.*

¹⁷² Justice Scalia, criticized the test as inherently vague, but could do no better. *Id.* at 372 (Scalia, J., concurring).

art, cinema, cable TV, family, etc.—may ultimately be constitutionally censorable.¹⁷³

To stem this progression, courts will have to hold that the workplace is unique. First, they might take the position that the workplace, unlike other venues, is not a place designed for the propagation of political and artistic battles. Second, they could maintain that the employer-employee relationship, although not a classic captive audience *situs*,¹⁷⁴ possesses enough elements of potential employer coercion to warrant limits on pornographic speech as a defense for powerless employees. Development of these arguments and rebuttals is beyond the scope of this Essay, but it is clear that these distinctions are not so obvious.

Another battle line for speech libertarians in the arena of sexual speech will be the distinction between words directed at a particular person (victim) and words or pictures directed to the world at large.¹⁷⁵ Given the direction of the two workplace cases, it is uncertain whether the distinction can hold.¹⁷⁶ It fails in the legal definition of obscenity, which may be regulated no matter how generalized the audience. There is no doubt that vicious, sexist speech directed at an individual woman transmits a particular and horrible harm that a book

¹⁷³ See, e.g., *Franklin v. Gwinnett County Pub. Sch.*, 112 S. Ct. 1028 (1992) (applying Title VI or Title VII-type damages in a Title IX suit); *Grove City College v. Bell*, 465 U.S. 555, 566 (1984) (finding Title IX requirements did not infringe first amendment rights of the college).

¹⁷⁴ See, e.g., *Frisby v. Schultz*, 487 U.S. 474, 484-87 (1988).

¹⁷⁵ In *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992), the Court invalidated a facially unconstitutional ordinance that attempted to prohibit racially motivated hate speech directed at individuals. The five Justices who made this argument were careful to emphasize that they did not mean to threaten the sexual harassment aspects of Title VII. *Id.* at 2546. Justice White, concurring, pointed out the difficulties the majority opinion would have in distinguishing Title VII fighting words speech from other hate speech that the Court's opinion would otherwise protect. *Id.* at 2560. The four concurring Justices (including White) agreed with the judgement on an overbreadth ground, but argued that, if properly drafted, a statute may ban hate speech because of its societal harm. Their approach may eventually prevail because of the impact of *Harris* on sexual harassment, and of future appointment of new justices to the Court who are more sensitive to the prevailing ideologies of our modern culture. The issue of group libel involving hate words was not at issue in *R.A.V.*

¹⁷⁶ It is generally agreed that *Beauharnais v. Illinois*, 343 U.S. 250 (1952), approving of group libel statutes, is no longer good law after *New York Times Co. v. Sullivan*, 376 U.S. 255 (1964). See *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 331 n.3 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

or film does not. In that sense, it is similar to defamation of an individual where there is harm to the reputation of a particular person. Courts have not been sympathetic to "group libel," where the harm is directed at a group, not an individual.¹⁷⁷ Nevertheless, when societal harm (not the crude immediate physical harm defined in *Brandenberg*¹⁷⁸) is accepted as the measure by which we fail to protect speech, then the distinction is problematical.

The allegedly sexist-pornographic book, film or television program addressed to a large audience may create immeasurably greater aggregate harm than the injury directed at a particular individual. MacKinnon has stressed the systemic harm, as she sees it, that pornographic speech does to society and the individuals within it. That kind of harm, given her assumptions, is far greater than the harm directed at an individual victim, no matter how bitter. Every censor, past and present, has focused on the institutional harm he or she fears and has made a similar argument, for censoring the book, movie or painting that creates that harm. It is a persuasive argument once we constitutionally fixate on the societal harm that speech may create. It is an argument that threatens free speech, as traditionally defined since it conflates speech with conduct.¹⁷⁹ Governments regulate conduct when they determine it is harmful. When we do the same with speech we confuse it with action. Pervasive censorship then becomes inevitable.¹⁸⁰

¹⁷⁷ See SMOLLA, *supra* note 153, at 165-67.

¹⁷⁸ *Brandenberg v. Ohio*, 395 U.S. 444, 444 (1969).

¹⁷⁹ For a very thoughtful piece on the topic of harassment, see Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1863-71 (1992) (developing the distinction between speech directed at an individual and undirected speech).

¹⁸⁰ See generally JONATHAN RAUCH, *KINDLY INQUISITORS: THE NEW ATTACKS ON FREE THOUGHT* (1993). See also Nicholas Wolfson, *Equality in First Amendment Theory*, 38 ST. LOUIS U. L.J. 379 (1993); Nicholas Wolfson, *Free Speech And Hateful Words*, 60 U. CIN. L. REV. 1 (1991).

