

# WHEN SILENCE SPEAKS LOUDER THAN WORDS: Authoritarianism and the Feminist Antipornography Movement

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Legal analysis of the regulation of sexually explicit material has focused primarily on whether such material qualifies as expression worthy of First Amendment protection and whether it presents a social threat that is sufficiently grave and imminent to justify compromise of that protection. Social science has concerned itself primarily with the potential impact of the material itself. This article considers the harmfulness, not of a category of expression such as pornography, but of the *censorship* of such material. The proposition is that such censorship—whether advocated by a neopuritanical, antierotic right or a feminist left—animates a pattern of problematic attitudes, affective states, and behaviors that is associated with authoritarianism and that therefore threatens to erode important First Amendment values. Enactment into positive law of the recent left-wing crusade against sexually explicit material may be every bit as constitutionally suspect as its right-wing counterpart and therefore warrants strict judicial scrutiny.

I say to the senator that what we have to be careful about is that we do not imitate the very thing we are against.

—Senator Brien McMahon (D, CT)

(in Senate debate February 20, 1950, concerning Senator Joseph McCarthy's accusations of Communist infiltration into the U.S. government)

“SILENCE!” the King of the Turtles barked back, “I’m King, and you’re only a turtle named Mack.”

—Seuss (T. Geisel), *Yertle the Turtle and Other Stories*

## I. Introduction

Something important is missing in First Amendment discourse, especially as it concerns the recent assault from the left on pornography.<sup>1</sup> Most of the focus has

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<sup>1</sup>Judge Stephen Reinhardt expressed these sentiments when he warned:

To urge the courts to distinguish between “good” and “bad” speech, as some on the left are prone to do these days, to urge that there are certain views one *ought* to have, that we all *ought* to be feminists, for example; to argue that we should suppress the speech of those who do not agree with us and, specifically, the speech of those who do not respect women sufficiently, is neither very sensible nor very practical.

Stephen Reinhardt, *The First Amendment: The Supreme Court and the Left—With Friends Like These*, 44 HASTINGS L.J. 809, 824–25 (1993). He pointed out that, as a practical matter, the concept of *shared values* may be chimerical, whereas the proper balance between First Amendment values of free expression and Fourteenth Amendment values of equality, or other compelling values such as life and death in the case of abortion protests, remain very much open to dispute. As a matter of principle, Judge Reinhardt suggested that

the left-wing effort to limit speech is no more acceptable constitutionally than the earlier right-wing attempts. . . . Historically, everyone who has sought to limit the First Amendment has always had a strong and superficially persuasive reason for doing so. Almost always there is a very real moral conviction that underlies the efforts of the speech suppressors.

been on the material sought to be restricted—whether it qualifies as expression worthy of First Amendment protection at all and, even if it does, whether it nevertheless presents a social threat that is sufficiently grave and imminent to justify compromise of that protection. This conventional speech-centered approach, which is implicitly shared by a range of First Amendment theories, conceives of the constitutional interest in largely negative terms.<sup>2</sup> It assumes that when the state seeks to restrict speech, the constitutional harm done is mostly a function of the speech lost. It is as if, so far as the First Amendment is concerned, all that the state has done is to create a hollow place where the proscribed speech used to be or would have been.

I argue that such restrictions can also inflict an affirmative, albeit more diffuse, kind of harm that ought to be weighed in the First Amendment balance.<sup>3</sup> The state does not just *prevent* something from happening (i.e., communication of a particular idea) when it restricts speech; the state can also *cause* something to happen. Censorship crusades themselves—no less than the material they seek to destroy—can embody a set of attitudes and belief systems about how people are and how they ought to interact with each other and their environment. In this way, censorship not only communicates an orthodoxy by silencing other perspectives, it also creates a social reality by animating a censorious state of mind.

Whereas social science has concerned itself primarily with the important but relatively molecular issues of the attitudinal, affective, and behavioral impacts of

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*Id.* at 825.

This article's focus on the social consequences of censorship—such as the First Amendment revisionists' focus on the social consequences of the speech that they find troublesome—sidesteps the problem of whose rights shall prevail when the exercise of one person's speech rights (e.g., the pornographer's) is said to intrude on the rights of another to unintimidated speech or other security from harm. For discussion of this problem, see Alon Harel, *Book Review: Free Speech Revisionism: Doctrinal and Philosophical Challenges*, 74 B.U. L. REV. 687 (1994) (reviewing CASS SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993)).

<sup>2</sup>The variety of theories that have been proposed to address those two questions (e.g., that an unencumbered flow of communication is necessary to allow humankind to struggle toward an elusive truth, to facilitate political accountability, to provide a nonviolent outlet for dissent, and to allow individuals to define the terms of their own self-fulfillment) seem to share this common underlying vision of the constitutional harm that the First Amendment seeks to prevent. See *infra* notes 325–28 and accompanying text.

<sup>3</sup>First Amendment doctrine has long recognized that government does, in a sense, speak coercively by silencing others, that the state does effectively prescribe orthodoxy of beliefs, ideas, attitudes, and experiences through control of expression.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

*West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (dealing with compelled expression). For example, in the flag-burning case, the Court concluded that government could not dictate the content of permissible beliefs concerning national unity by constricting one particularly emphatic expression of dissenting views on that subject. To rule otherwise, the Court reasoned,

would be permitting a State to “prescribe what shall be orthodox” by saying that one may burn the flag to convey one's attitude toward it and its referents only if one does not endanger the flag's representation of nationhood and national unity.

*Texas v. Johnson*, 491 U.S. 397, 417 (1989). This article suggests that, in addition to the particular implicit countermessage conveyed when the state punishes or prohibits speech, censorship promotes another, more general message endorsing coercive, authoritarian reactions to unwanted viewpoints.

pornography, I seek to apply social science to the largely overlooked, more molar question of the potential harmfulness, not of a category of expression such as pornography, but of the act of censorship of such materials. The proposition is that through censorship, the socially influential and ultimately coercive force of law breathes life into a pattern of problematic attitudes, affective states, and behaviors—giving that pattern an ambulatory power and mantle of legitimacy it might never have acquired through advocacy—that is associated with authoritarianism.

Social scientists have studied authoritarianism as a distinct phenomenon for more than half a century. The weight of that research describes a social milieu that is fundamentally incompatible with a relatively mainstream conception of First Amendment values. Life itself, no less than “debate on public issues,” is far from “uninhibited, robust, and wide-open”<sup>4</sup> in an authoritarian society; experience teaches that it becomes paranoid, dreary, and humorless. Authoritarianism is intolerant of ambiguity, uncritical of extant cultural values, conformist, cynical, suspicious of “outsiders,” ethnocentric, absolutist, rigid, and closed-minded. It operates through power, dominance, antidemocratic propaganda, stereotyping, antirational beliefs, punitive aggression against those who challenge convention, and submission to authority primarily on the basis of that agency’s perceived power and status rather than its intrinsic legitimacy and validity. The metabolites in its lifeblood are fear, hate, and ignorance.

If, as I suggest, authoritarianism degrades the environment in which First Amendment values flourish, then there is good reason to have what clinicians refer to as a “high index of suspicion” in evaluating proposals to restrict sexually explicit materials. Authoritarian tendencies are especially virulent with respect to sexuality. Research into authoritarianism has consistently found a pattern of erotophobia, “exaggerated concern with sexual matters, a desire to censor sexual material, and a tendency to punish those who violate sexual norms.”<sup>5</sup>

Because of its authoritarian potential, the censorship of sexually explicit materials threatens to erode important First Amendment values even if the absence of pornography itself would be no great social loss (or even some benefit). For this reason, enactment into positive law of the left-wing crusade against sexually explicit material may be every bit as constitutionally suspect as its right-wing counterpart and therefore warrants strict judicial scrutiny. This analysis would keep the burden where it belongs—on the state—to prove that its regulatory program is constitutionally harmless.

To support these assertions, I examine an influential faction of the feminist antipornography movement—spearheaded by Catharine MacKinnon and Andrea Dworkin—for its authoritarian content, structure, and appeal. The operative assumption here is that if authoritarian markers pervade their approach, as I believe is the case, then legislative adoption of their agenda would reflect a net increase in the level of authoritarianism in our society.<sup>6</sup> MacKinnon and Dworkin have

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<sup>4</sup>New York Times v. Sullivan, 376 U.S. 254 (1964).

<sup>5</sup>Donn Byrne et al., *Husband–Wife Similarity in Response to Erotic Stimuli*, 41 J. PERSONALITY 385, 386 (1973) [hereinafter *Husband–Wife Similarity*].

<sup>6</sup>I certainly do not advocate suppression of the MacKinnon–Dworkin position, but I do suggest that we ought to consider carefully the implications of allowing it to speak, and to act, through the blunt instrument of state power. As MacKinnon herself observed,

Law is only words. It has content, yet we do not analyze law as the mere expression of ideas. When we object to a law—say, one that restricts speech—we do not say we are offended by it. We are

advocated legislative creation of a civil rights cause of action, in favor of persons (chiefly women) who are allegedly injured in various ways by pornography, against persons who produce, sell, exhibit, or distribute pornography.<sup>7</sup> The First Amendment is implicated because, as the U.S. Supreme Court has reasoned in other contexts, civil liability can create a potent governmentally imposed disincentive to engage in the targeted expression.<sup>8</sup>

The MacKinnon–Dworkin perspective offers a useful case study in several respects. First, the authors attempt to distinguish their proposal from the more familiar right-wing antierotic moralism by arguing that it is necessary to deter and to compensate atrocities inflicted on women as the alleged result of pornography.<sup>9</sup> They thus implicitly deny that they advocate a state-mandated orthodoxy of neo-puritanical aversion to sexuality and assert instead that they are simply trying to protect women.

Second, their perspective has been influential: Legislators have listened to and sometimes endorsed their proposals. Although the Supreme Court upheld the Seventh Circuit's invalidation of the MacKinnon–Dworkin legislation,<sup>10</sup> their position has also found legislative expression in Canada and has been upheld by that country's highest court.<sup>11</sup> And the Supreme Court's chronic ambivalence about sexual explicitness, recently evident, for example, in the nude dancing case,<sup>12</sup> suggests that the constitutional question is far from settled in this country as well. Moreover, the 1986 Attorney General's Commission on Pornography recommended stringent control of such material, reciting in part arguments similar to those advanced by MacKinnon and Dworkin.<sup>13</sup> Their position also lends some "feminist" cover to the right wing's opposition to pornography, at a time when policymakers are strongly influenced by groups such as the Christian Coalition.<sup>14</sup> More generally, apart from whether their specific legislative proposals find constitutional expression in this

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scared or threatened or endangered by it. We look to the consequences of the law's enforcement as an accomplished fact and to the utterance of legal words as tantamount to imposing their reality.

CATHARINE A. MACKINNON, *ONLY WORDS* 40 (1993).

<sup>7</sup>In this game, of course, definitions can be dispositive. The MacKinnon–Dworkin project defined the term *pornography* indeterminately as "graphic sexually explicit materials that subordinate women through pictures or words." *Id.* at 22. The subjective nature of the judgment that certain material subordinates, and the sweeping content to that term evident in the MacKinnon–Dworkin literature, describe a vast territory of undefined boundaries. For the most part in this article, I use the term as they do, to refer to almost any sexually oriented material. When more precise definition is relevant, it is so noted.

<sup>8</sup>*New York Times v. Sullivan*, 376 U.S. 254 (1964). For detailed discussion of the deterrent effects of civil liability for speech, see David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487 (1991).

<sup>9</sup>Thus, under this view, the American Booksellers Association's successful First Amendment challenge to Indianapolis's antipornography ordinance struck a blow not for freedom of expression but for the oppressors and exploiters of women, and not against the tyranny of censorship but against women's fight for equality. *ONLY WORDS*, *supra* note 6, at 92–94; *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *summarily aff'd*, 475 U.S. 1001 (1986).

<sup>10</sup>*American Booksellers Ass'n v. Hudnut*, 475 U.S. 1001 (1986), *aff'g* 771 F.2d 323 (7th Cir. 1985).

<sup>11</sup>*Butler v. The Queen*, 1 S.C.R. 452 (1992) (Can.).

<sup>12</sup>*Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

<sup>13</sup>U.S. DEP'T OF JUSTICE, ATT'Y GEN. COMM'N. ON PORNOGRAPHY, FINAL REPORT (1986) (hereinafter THE "MEESE COMMISSION REPORT").

<sup>14</sup>For example, opposition to pornography is one of the items on the Christian Coalition's so-called Contract With the American Family, which has been endorsed by House Speaker Newt Gingrich. Jill Zuckman, *Christian Right's "Contract" is Embraced by Gingrich*, BOSTON GLOBE, May 18, 1995, at 18.

country, their voices are quite prominent in public debate on regulation of pornography.<sup>15</sup>

Third, MacKinnon's and Dworkin's own analysis implicitly concedes the cogency of my basic approach: If, as they argue, one must worry about how pornography changes people and society—to make the world a “pornographic place”—then one also must be concerned about how censorship changes things to make the world a more authoritarian place. Pornography may work through a largely nonrational process involving basic feelings and urges, as MacKinnon and Dworkin argue, but the evidence suggests that authoritarianism does so as well.<sup>16</sup> In other words, whereas MacKinnon and Dworkin assert that pornography reinforces the commercialized exploitation and abuse of women with the hedonic power of sex, I suggest that censorship reinforces the politicized proliferation of intolerance, punitiveness, and closed-mindedness with the seductive pleasures of self-righteousness. Although pornography may or may not cause the harms described by MacKinnon and Dworkin, research indicates that authoritarianism is strongly correlated with a constellation of problematic attitudes and behaviors, including aggression, stereotyping, inequality, and discrimination. Whatever may be the case concerning pornography, I suggest that, with respect to censorship, to borrow MacKinnon's words, “It is what it takes to make it and what happens through its use that are the problem.”<sup>17</sup>

In Part II of this article, I summarize the key features of (a) pornography's status under the First Amendment, (b) the MacKinnon–Dworkin antipornography position, and (c) the phenomenon of authoritarianism. Part III shows that the MacKinnon–Dworkin position, in both its content and structure, evidences important indices of authoritarianism. In Part IV, I discuss concerns raised, both as a matter of policy and First Amendment theory, by the authoritarian approach to sexually explicit materials advocated by MacKinnon and Dworkin.

## II. Overview: First Amendment, MacKinnon–Dworkin, and Authoritarianism

### A. First Amendment and Pornography

A brief overview of basic constitutional principles sets the stage for consideration of the MacKinnon–Dworkin position. The Court typically imposes an extremely heavy burden of justification on the government for actions that appear to invade constitutionally protected domains. In the free speech context, the Court has been most vigilant when it suspects that government action seeks to interdict the communication of a particular viewpoint or about a particular subject. The Court has attempted to describe such cases by loosely distinguishing between government action aimed predominantly at conduct rather than speech or between regulation targeting the content of expression and content-neutral regulation that incidentally affects expression. The Court also, however, has attempted to define categories of expression that government may seek to restrict on the basis of its content, subject to

<sup>15</sup>For a description of the continuing influence of the MacKinnon–Dworkin project, *Hudnut* notwithstanding, see Nadine Strossen, *A Feminist Critique of “The” Feminist Critique of Pornography*, 79 VA. L. REV. 1099, 1114–27 (1993).

<sup>16</sup>MacKinnon argues that pornography changes men for the worse through “a process that is largely unconscious and works as primitive conditioning.” ONLY WORDS, *supra* note 6, at 16.

<sup>17</sup>*Id.* at 15.

the much more deferential level of review that the judiciary applies to most constitutionally unremarkable government action. The usual reasons are that the Court has deemed such expression as having little or no message, as presenting a serious risk of harm, or as involving both defects. Examples include obscenity, child pornography, incitement to imminent lawless action, and so-called fighting words.

As in other areas of constitutional law involving open-ended textual provisions and multifaceted, evolving norms, the Court has addressed the First Amendment's inevitable tensions and conflicts by attempting to balance competing considerations.<sup>18</sup> The Court engages in a kind of macrolevel, definitional balancing when it delimits the categories that determine the degree of judicial scrutiny to be applied to regulation of speech. The Court engages in more meso- or microlevel, case-specific balancing when it applies the indicated level of scrutiny to the challenged regulation's purposes and means; and sometimes the Court conflates these approaches by developing categorical boundaries that are indeterminate, diffuse, and ephemeral.

This approach has determined the extent to which government can regulate sexually oriented material in several general ways that are pertinent here. First, the Court has ruled that government may seek to restrict or prohibit sexually oriented material because of its content—without supplying the high level of justification and tight means-ends fit in each case typically required of content-based restrictions—when that material meets the Court's criteria for obscenity. Although the Court has shied away from articulating a comprehensive theory of the First Amendment that would account for that result, the Court suggested, in casual dicta, that “lewd and obscene” works “are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”<sup>19</sup> The Court has also opined that a state has several legitimate interests in regulating obscenity, including preservation of the quality of life of the community, regulation of the business environment in centers of commerce, and protection of the public from harmful conduct that might be prompted by obscenity.<sup>20</sup>

Furthermore, some observers have argued that obscenity is properly excluded from First Amendment protection in the Court's definitional balance because it serves no important First Amendment value. Under this view, obscenity resembles other so-called low-value speech categories, such as commercial speech, and consequently deserves less protection than conventional high-value speech, such as political speech. Obscenity arguably qualifies as low-value speech because it is said not to concern public affairs, to be noncognitive in appeal, not to convey a message, and to raise concerns that government might legitimately seek to address.<sup>21</sup>

By contrast, the Court on occasion has applied relatively exacting review to government efforts to regulate adult sexually oriented material—even material that is quite explicit—which is definitionally distinguished from obscenity by the label

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<sup>18</sup>The Court has addressed the uncertainty inherent in interpreting vaguely defined constitutional values in a changing world “by increasingly relying on a balancing methodology that purportedly accounts for the indeterminacy of the enterprise.” David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 Nw. U. L. REV. 641, 642 (1994) (“In the twentieth century, balancing has swiftly overtaken formalism as the preferred method of constitutional adjudication across the entire constitutional spectrum.” *Id.* at 645.).

<sup>19</sup>*Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

<sup>20</sup>*Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973).

<sup>21</sup>Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 602–604.

*pornography*.<sup>22</sup> Efforts to distinguish unprotected obscenity from protected pornography, and the substantial boundary problems that such definition entails, have dominated judicial attention in this area.

The judiciary has approached this definitional task from several angles. One variable has been the material's assumed impact on its reader or viewer. Initially, American courts followed the English judiciary's emphasis—in *Regina v. Hicklin*—on the material's tendency “to corrupt those minds who are open to such immoral influences, and into whose hands publications of this sort may fall.”<sup>23</sup> Eventually, however, the Court announced that the proper test under the First Amendment is “whether the *average person*, applying *contemporary community standards*, would find that the work . . . appeals to the *prurient interest*. . . .”<sup>24</sup>

Another variable has been the courts' approach to the material itself. At first the courts concentrated on isolated passages, under which approach works such as Theodore Dreiser's *An American Tragedy* and D. H. Lawrence's *Lady Chatterly's Lover* were held to be obscene.<sup>25</sup> Eventually, courts began to consider not the most salacious passages in isolation but the entire work as a whole.<sup>26</sup> Nevertheless, during this period the novel *Memoirs of Hecate County*, by the then leading literary critic, Edmund Wilson, was held to be obscene—a ruling affirmed by divided vote without opinion by the Court.<sup>27</sup> The Court explicitly adopted the “work as a whole” standard in 1957.<sup>28</sup> Finally, the Court (or a plurality of its Justices) has shifted from assuming that material otherwise meeting the definition for obscenity was “utterly without redeeming social importance,”<sup>29</sup> to requiring that the material be “utterly without redeeming social value” to be included within the definition of obscenity,<sup>30</sup> to allowing some material to be so classified, even if not “utterly” without some value.<sup>31</sup>

Although the Court has reaffirmed the obscenity–pornography distinction with respect to adult materials, it has ruled that child pornography is entitled to no First Amendment protection whatsoever. The Court has reasoned that films and photographs depicting sexual activity of children are linked to the sexual abuse and

<sup>22</sup>E.g., *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989).

<sup>23</sup>*Regina v. Hicklin*, L.R. 3 Q.B. 360, 368 (1868). See generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 906–19 (1988) (tracing development of definition).

<sup>24</sup>*Miller v. California*, 413 U.S. 15, 22 (1973) (emphases added to highlight the elements) (quoting *Kois v. Wisconsin*, 408 U.S. 229, 230, in turn quoting *Roth v. United States*, 354 U.S. 476, 489). But see *Mishkin v. New York*, 383 U.S. 502 (1966) and *Ward v. Illinois*, 431 U.S. 767 (1977), in which the Court indicated that sadomasochistic material could be proscribed. See TRIBE, *supra* note 23, at 910–11 n.51 (arguing that *Mishkin* and *Ward* are retrogressive and contribute to the incoherence of the Court's obscenity decisions). In *Pinkus v. United States*, 436 U.S. 293 (1978), however, the Court reconciled *Mishkin* and *Ward* with *Miller* by allowing the “average person” element to include members of “deviant” groups. See TRIBE, *supra*, note 23.

<sup>25</sup>TRIBE, *supra* note 23, at 906–07.

<sup>26</sup>E.g., *United States v. One Book Called “Ulysses,”* 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd* 72 F.2d 705 (2d Cir. 1934).

<sup>27</sup>*People v. Doubleday & Co.*, 71 N.Y.S.2d 736 (1947), *aff'd*, 77 N.E.2d 6 (1947), *aff'd by equally divided Court sub nom.* *Doubleday & Co. v. New York*, 335 U.S. 848 (1948). For an overview, see JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 1134–36 (4th ed. 1991).

<sup>28</sup>*Roth v. United States*, 354 U.S. 476, 489 (1957).

<sup>29</sup>*Id.* at 484.

<sup>30</sup>*A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Attorney Gen. of Mass.*, 383 U.S. 413, 419 (1966).

<sup>31</sup>*Miller v. California*, 413 U.S. 15, 24. See TRIBE, *supra* note 23, at 908–09 (setting forth the foregoing analysis of the “utterly without redeeming value” element).

exploitation of children and constitute enduring monuments to that abuse. The government has a compelling interest in protecting the well-being of children who are incapable of consenting to participation in the production of pornography. Child pornography prohibitions advance that interest by targeting the market for such material.<sup>32</sup>

In another line of cases, the Court has upheld government action that has the practical effect of substantially restricting the availability of nonobscene sexually explicit material without subjecting that action to stringent judicial review. Although the government may not regulate the content of protected materials, it may limit the time, manner, and place in which the sexually explicit materials are distributed. The Court has ruled that a law does not restrict content of speech if the government intends only to control the so-called "secondary effects" of pornographic material on the surrounding community—such as crime, trade, or the quality of a commercial district. Thus, a zoning ordinance that substantially restricts the sites in which pornographic films may be shown is permissible unless its purpose is to restrict the content or message of the speech.<sup>33</sup> The Court subsequently noted, however, that secondary effects do not include effects emanating from the impact on the listener or observer of the expression;<sup>34</sup> to hold otherwise surely would allow that doctrine to swallow the general rule of content neutrality.

### B. The MacKinnon–Dworkin Campaign

Pornography is not restricted here because of what it says. It is restricted through what it does. Neither is it protected because it says something, given what it does.

—Catharine MacKinnon

As mentioned earlier, Catharine MacKinnon and Andrea Dworkin claim to base their feminist antipornography position on the harm that porn allegedly inflicts on women, rather than on puritanical disapproval of eroticism. They contend that pornography causes such harm in three ways: (a) Actresses and models, many of whom are allegedly coerced into participating, are abused, mistreated, raped, and sometimes murdered in its production (which I will hereinafter refer to as *production harm*); (b) its consumption specifically causes an increase in the incidence of male violence against women (*consumption-violence harm*); and (c) its existence contributes more generally to a view of women that is dehumanized and degraded, and which manifests, for example, as sexual harassment (*consumption-attitude harm*).

MacKinnon's recent book *Only Words*, an especially forceful presentation of this position, responds on several levels to First Amendment challenges to anti-pornography regulations, including those drafted by MacKinnon and Dworkin.<sup>35</sup>

<sup>32</sup>New York v. Ferber, 458 U.S. 747 (1982); Osborne v. Ohio, 495 U.S. 103, 108–110 (1990).

<sup>33</sup>Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976); City of Renton v. Playtime Theaters, 475 U.S. 41 (1986).

<sup>34</sup>Boos v. Barry, 485 U.S. 312, 320–21 (1988) ("The emotive impact of speech on its audience is not a 'secondary effect'"); R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2549 (1992) (same).

<sup>35</sup>For earlier versions of her position, see Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.—C.L. L. REV. 1 (1985); Catharine A. MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321 (1984). For other expressions of the argument that pornography harms and silences women, see, e.g., Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN'S L.J. 1 (1985); ANDREA DWORIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1981); Marianne Wesson, *Sex, Lies, and Videotape: The Pornographer as Censor*, 66 WASH. L. REV. 913 (1991); Rae Langton,



First, MacKinnon argues in effect that laws against pornography do not implicate First Amendment concerns any more than do laws against rape or, for that matter, bank robbery. No one seriously suggests that rape laws raise First Amendment problems on the grounds that rape expresses a viewpoint on gender relations or if the rapist happens to speak while committing the crime, and a bank robber's note saying "this is a stick-up, hand over the money" is not constitutionally cognizable as communicating protected ideas or information.<sup>36</sup> To MacKinnon, the conventional approach to pornography regulation as presenting a First Amendment problem simply because a medium of expression is involved elides *what* harm is done by focusing on the means used to inflict it.<sup>37</sup> Thus, according to MacKinnon, the speech-conduct distinction is meaningless in the context of pornography because words are acts and acts are committed through words;<sup>38</sup> regulation of pornography therefore ought to be largely invisible to the First Amendment and evaluated under the very deferential standard that the Court applies to legislation that does not implicate such constitutional values. More recently, MacKinnon has equated words about rape with the act of rape itself.<sup>39</sup>

This move is different from the assertion—advanced, for example, by Frederick Schauer—that pornography is little more than a sex aid and thus is virtually nonspeech.<sup>40</sup> MacKinnon's concern with consumption-violence and consumption-attitude harm places her in a dilemma under the speech-conduct distinction because both harms arise, if at all, when pornography is understood to communicate some message. She evades the dilemma by deconstructing an overarticulated version of the distinction and concluding that because the First Amendment offers no protection to a class of harmful speech-acts (such as conspiracies in restraint of trade, fraud, or hold-up notes), it likewise offers no protection to pornography.<sup>41</sup>

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*Speech Acts and Unspeakable Acts*, 22 PHIL. & PUB. AFF. 293 (1993); Rae Langton, *Whose Right? Ronald Dworkin, Women, and Pornographers*, 19 PHIL. & PUB. AFF. 311 (1990).

<sup>36</sup>The Court has upheld laws that enhance penalties for "bias-inspired" criminal conduct, even when evidence of that bias derives from verbal expression. *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993).

<sup>37</sup>According to [this] approach,

pornography falls presumptively into the legal category "speech" at the outset through being rendered in terms of "content," "message," "emotion," what it "says," its "viewpoint," its "ideas." Once the women abused in it and through it are elided this way, its artifact status as pictures and words gets its legal protection through a seemingly indelible categorical formalism that then must be negated for anything to be done.

ONLY WORDS, *supra* note 6, at 10–11.

<sup>38</sup>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.

<sup>39</sup>For example, MacKinnon charged that a particularly negative and offensive review of ONLY WORDS by Carlin Romano in *The Nation*, in which he hypothesized an imagined rape of MacKinnon to challenge her assertion that "to say it is to do it," constituted a "public rape" of MacKinnon herself. *E.g.*, David Mehegan, *War of Words Erupts Over "Rape" Review*, BOSTON GLOBE, January 6, 1994, at 45.

<sup>40</sup>Frederick Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 922–23 (1979).

<sup>41</sup>The logical flaw in her syllogism is apparent when her position is contrasted with *Wisconsin v. Mitchell*. Mitchell's statement to his companions, "There goes a white boy; go get him," was followed immediately by the group's attack on their victim. The speaker was one of the actual attackers. The saying and the doing were indisputably linked in one seamless activity leading to a beating that put the "white boy" in a coma. By contrast, Romano's book review, offensive as it might have been, was itself no more an

The second level of the feminist antipornography position closely resembles the first one but seems more to operate within the First Amendment's balancing paradigm than to traverse it. Even if the First Amendment somehow must be taken into account in the case of pornography, MacKinnon and Dworkin contend, porn's dangerousness and valuelessness justify its treatment as unprotected speech, as are obscenity and child pornography. Although MacKinnon and Dworkin eschew engagement in the difficult definitional task required by the Supreme Court's distinction between unprotected obscenity and protected pornography, their argument from harmfulness up to this point is one relatively familiar to First Amendment analysis. MacKinnon and Dworkin take a crucial next step, however: They propose that, even if it is regarded somehow as speech under the First Amendment, pornography is especially insidious because it converts the alleged coercion, humiliation, exposure, domination, rape, battery, and murder of women into a powerfully reinforcing sexual experience for men. They argue that it thereby constructs the social reality of male sexual experience as the commercialized violent and overt sexual abuse of women, protected by a scrim of formalistic and perverse First Amendment reasoning. "Put another way, if there is anything that only pornography can say, that is exactly the measure of the harm that only pornography can do."<sup>42</sup>

In this way, the MacKinnon–Dworkin approach would greatly reduce the scope of First Amendment protection for sexually explicit material. For one thing, it would reinvigorate the corruptibility model of *Regina v. Hicklin* with a vengeance: The material's appeal to an entire class (men), on the basis of an assumed corruptibility of that class as evidenced by the behavior of its most deviant members, would become a justification for sweeping regulation (not even a required definitional standard). Furthermore, this approach would collapse the distinction between secondary effects and content neutrality, so that material could be suppressed because of the message it is asserted to convey.

*Only Words*'s third level attempts to play a constitutional trump card by proposing that the equal protection clause of the Fourteenth Amendment modifies the scope of the First Amendment's free speech clause.<sup>43</sup> This aspect of MacKinnon's brief portrays the Court's laissez-faire First Amendment jurisprudence as entrenching an allocation of speaking power that is grossly unequal along economic, racial, and sexual dimensions, and as shielding speech-acts of the powerful that seriously injure and effectively silence the powerless, in contravention of the equality norm embodied in the Fourteenth Amendment. The Court's failure to recognize the inequalities perpetuated by pornography (through all three of the kinds of harms it inflicts) resembles in MacKinnon's view the Court's constitutional equation of Ku Klux Klan speech advocating racial hatred and violence with civil rights leaders'

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act of actual rape than the multitude of sexually violent scenes portrayed in ANDREA DWORKIN, *MERCY* (1991).

<sup>42</sup>ONLY WORDS, *supra* note 6, at 22.

<sup>43</sup>[T]he First Amendment has grown as if a commitment to speech were no part of a commitment to equality and as if a commitment to equality had no implications for the law of speech—as if the upheaval that produced the Reconstruction Amendments did not move the ground under the expressive freedom, setting new limits and mandating new extensions, perhaps even demanding reconstruction of the speech right itself.

*Id.* at 71.

vigorous support for a boycott of businesses that practice racial discrimination:

Suppressed entirely in the piously evenhanded treatment of the Klan and the boycotters—the studied inability to tell the difference between oppressor and oppressed that passes for principled neutrality in this area as well as others—was the fact that the Klan was promoting inequality and the civil rights leaders were resisting it, in a country that is supposedly not constitutionally neutral on the subject.<sup>44</sup>

The MacKinnon–Dworkin position thus seeks to redefine the premises of the pornography debate. The image depicted in *Only Words* is no First Amendment open marketplace of ideas; it is a slave trade in women’s flesh, psyches, and lives. MacKinnon, like others,<sup>45</sup> characterizes traditional free speech jurisprudence as originating in concerns with political communication directed primarily at the intellect. By contrast, she argues, pornography’s message is “get her”; and it is uniquely “addressed directly to the penis, delivered through an erection, and taken out on women in the real world.”<sup>46</sup> The solution to this perceived carnage against women, according to MacKinnon and Dworkin, is the deployment of coercive legal force, through a legislatively created civil rights cause of action against those who produce, sell, exhibit, or distribute pornography.<sup>47</sup>

In this way, the MacKinnon–Dworkin position expressly eschews the traditional neutrality expressed by Justice Powell’s famous dictum, “there is no such thing as a false idea.”<sup>48</sup> As Cass Sunstein has argued, conclusions about neutrality depend heavily on one’s baseline assumptions:

Obscenity law, insofar as it is tied to community standards, is therefore deemed neutral, but only because the class of prohibited speech is defined by reference to existing social values. Antipornography legislation is deemed impermissibly partisan because the prohibited class of speech is defined by less widely accepted ideas about equality between men and women—more precisely, by reference to a belief that equality does not always exist even in the private realm, that sexual violence by men against women is more of a problem than sexual violence by women against men, and that the sexual status quo is an ingredient in sexual inequality.<sup>49</sup>

In a society permeated by sexual inequality, abuse, and violence, MacKinnon and Dworkin contend, the Court’s purported neutrality is little more than a facade for the institutionalization of that status quo.

Although the accuracy of *Only Words*’s portrayal of First Amendment doctrine, the coherence of the MacKinnon–Dworkin argument as a matter of logic or constitutional law, and its many factual assumptions (some articulated, some not) are subject to serious criticism on their own terms,<sup>50</sup> the remainder of this article will not be devoted specifically to exposing such flaws. In this article, I am not primarily concerned with whether the MacKinnon–Dworkin position is wrong in key respects—

<sup>44</sup>*Id.* at 86–87.

<sup>45</sup>See *supra* notes 19–21 and accompanying text.

<sup>46</sup>ONLY WORDS, *supra* note 6, at 21–22.

<sup>47</sup>See *id.* at 22; American Booksellers Ass’n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *summarily aff’d*, 475 U.S. 1001 (1986).

<sup>48</sup>Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

<sup>49</sup>Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 29 (1992).

<sup>50</sup>For an especially thorough and devastating critique, see Strossen, *supra* note 15, *passim*.

for example, whether pornography really does cause substantial production, consumption-violence, and consumption-attitude harm and therefore is a bad thing that might be constitutionally proscribed. Instead, my central point is that censorship proposals that are authoritarian in their structure and content are themselves worrisome things that the Constitution might well preclude. Nevertheless, in the course of exploring the authoritarian aspects of the MacKinnon-Dworkin position, I necessarily have occasion to question the validity and cogency of some of its assumptions and arguments. Before turning to that analysis in the next part of this article, I present a brief overview of the construct of authoritarianism.

### C. Authoritarianism

At the height of the Holocaust, a massive sociopsychological study of the phenomena of fascism, anti-Semitism, and social discrimination was organized by Max Horkheimer at the University of California at Berkeley. The Berkeley Study focused on "the rise of an 'anthropological species' we call the authoritarian type of man," who "seems to combine the ideas and skills which are typical of a highly industrialized society with irrational or anti-rational beliefs."<sup>51</sup> The study hypothesized that there exists a personality profile—that is, relatively stable and pervasive characteristics and tendencies that form a coherent pattern—of "the *potentially fascistic* individual, one whose structure is such as to render him particularly susceptible to anti-democratic propaganda."<sup>52</sup> The study's major finding was that "individuals who show extreme susceptibility to fascist propaganda have a great deal in common."<sup>53</sup> Viewing fascism as the gravest political and social threat of modern times and wondering whether such a thing could happen in the United States, the Berkeley psychologists sought to understand the psychological typologies and forces that constitute and drive it.

Publication of *The Authoritarian Personality*, setting forth the Berkeley group's findings, although not the first consideration of the problems of prejudice and antidemocratic trends,<sup>54</sup> prompted a period of intensive study of authoritarianism as psychological phenomenon. At first, this ensuing work was primarily concerned with methodological shortcomings of the Berkeley Study (especially the development of a more valid and reliable Fascism (F) scale with which to identify authoritarian

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<sup>51</sup>Max Horkheimer, *Preface to the Abridged Edition* of T.W. ADORNO ET AL., *THE AUTHORITARIAN PERSONALITY* at xi (1993). The original, unabridged edition, first published in 1950, weighed in at more than 1,000 pages. The abridged edition is a much more accessible source and sets forth in their entirety those portions of the study relevant to the present enquiry. All citations in this article are to the abridged edition.

<sup>52</sup>*Id.* at 1.

<sup>53</sup>*Id.*

<sup>54</sup>See, e.g., ERICH FROMM, *ESCAPE FROM FREEDOM* (1941). For a brief overview of the historical development of the construct, see Detlef Oesterreich, *Authoritarianism: The End of A Concept?*, 68 HIGH SCH. J. 97, 97-99 (1985). Oesterreich's article was presented at the October 1984 International Conference on Authoritarianism and Dogmatism, Potsdam, New York. All citations in this article to the HIGH SCHOOL JOURNAL are to Potsdam Conference articles.

For a study, published in the immediate postwar period, of the nature of "how systems founded on the supremacy of society have controlled the life of the individual," see HAROLD W. METZ AND CHARLES A.H. THOMSON, *AUTHORITARIANISM AND THE INDIVIDUAL* (1950). Metz and Thomson examined how individual rights are regulated in six controlled societies: 13th-century feudal England; 16th- and 17th-century absolute monarchies in Europe; 20th-century Soviet Russia, Nazi Germany, and Fascist Italy; and voluntarily formed, controlled communities within the United States.

tendencies).<sup>55</sup> The search for useable scales eventually led, however, to the accumulation of a body of literature correlating revised F scale scores with numerous other ideological, cognitive, attitudinal, and personality characteristics to develop a profile of the authoritarian personality.<sup>56</sup>

The Berkeley investigators regarded the authoritarianism phenomenon through a psychoanalytic theoretical model. That perspective conceives of the authoritarian personality as a manifestation of a poorly integrated superego's compensation for a weak ego's inability to mediate the sexual and aggressive impulses of the id within the constraints of social relations. Because the authoritarian individual fears and feels ill equipped to confront directly such feelings, he or she defends against them indirectly through several mostly unconscious mechanisms: *repression*, or the exclusion from consciousness of unacceptable thoughts, feelings, and urges, which can sometimes emerge in a disguised form; *displacement*, or the shifting of ideas, emotions, and desires from their original object onto a (usually safer) substitute; *projection*, or the attribution to others of what is emotionally intolerable for the self; and *splitting*, or the tendency to view self and others as all good or all bad without integrating positive and negative attributes.<sup>57</sup>

Despite the large volume of criticism directed at *The Authoritarian Personality* since its publication, important aspects of its rich insights and conceptions have endured; most notably, it has pointed the way for identification of core attributes of authoritarianism.<sup>58</sup> Those attributes can be organized into four interrelated categories: intergroup relations, dominance and submission, closed-mindedness, and sexuality. Each is briefly discussed in turn.

*1. Intergroup relations.* The authoritarian personality needs out-groups. They allow the authoritarian to maintain social distance and to categorize human relations by identifying and rejecting out-groups throughout multiple levels of social organization.<sup>59</sup> Although originally focused on anti-Semitism and other forms of ethnocen-

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<sup>55</sup>See, e.g., STUDIES IN THE SCOPE AND METHOD OF "THE AUTHORITARIAN PERSONALITY" (Richard Christie & Marie Jahoda eds., 1954).

<sup>56</sup>See generally Frances Cherry & Donn Byrne, *Authoritarianism*, in PERSONALITY VARIABLES IN SOCIAL BEHAVIOR 109, 120–21 (Thomas Blass ed., 1977); JOHN P. KIRSCHT AND RONALD C. DILLEHAY, DIMENSIONS OF AUTHORITARIANISM: A REVIEW OF RESEARCH AND THEORY 1–34 (1967).

<sup>57</sup>For definitions of defense mechanisms, see DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV at 751–57 (Michael B. First, MD et al. eds., 1994) [hereinafter DSM-IV].

<sup>58</sup>Weak in evidence as it turned out to be, the book remained rich in conception and fertile in implication. Intolerably long, sprawling, and virtually unreadable as a totality, it proved bigger than the swarm of critical studies that one would have thought would destroy it. And evidence kept coming in that lent support to aspects of its underlying conceptions.

M. Brewster Smith, *Foreword* to KIRSCHT & DILLEHAY, *supra* note 56, at vii–viii.

One ardent critic of the authoritarianism literature as nonrigorous, "kind to Leftists," and as written by psychologists who are "Left-wing by general community standards," has been John J. Ray, a self-proclaimed anarchist. John J. Ray, *The Scientific Study of Ideology is too Often More Ideological than Scientific*, 10 PERSONALITY & INDIVIDUAL DIFFERENCES 331, 331–36 (1989). Cf. John J. Ray, *The Psychopathology of the Political Left*, 68 HIGH SCH. J. 415, 418 (1985) ("Ideological Leftists are unable to acknowledge their authoritarian motives and ordinary Leftists voters are quite likely to be high scorers on the F scale.") For one brief critique of Ray, see Larry R. Petersen & Karen Wilkinson, *Reply to Ray's "The Scientific Study of Ideology is too Often More Ideological than Scientific,"* 11 J. PERSONALITY & INDIVIDUAL DIFFERENCES 645 (1990).

<sup>59</sup>Cross-cultural studies have described "the universal ethnocentric person," who is "authoritarian, conforming, uncritical of cultural values, conservative, and intolerant of ambiguity." KIRSCHT & DILLEHAY, *supra* note 56, at 37.

trism, the Berkeley Study eventually concluded that intolerance for and hostility toward out-groups in general (rather than just toward ethnic minorities) characterize the authoritarian personality.<sup>60</sup>

Having failed to develop internally a consistent and enduring set of values, the authoritarian gravitates toward external sources of behavioral control, simultaneously both craving the comfort of externalized responsibility and resenting the resulting stultification of identity and inhibition of impulses. That hostility in turn also is both displaced against and projected onto out-groups. Consequently,

The outgroup was the target of hostility resulting from this particular aberration of superego functioning. A weak ego, not completely in control of behavior and unaccepting of the responsibility for feelings and actions, was the structure assumed to underlie rigid categorical thinking, rejection of feelings as a basis for action, and the projection of sexual and aggressive motives onto others.<sup>61</sup>

The Berkeley Study's analysis of anti-Semitism described the typical authoritarian pattern of intergroup relations. Anti-Semitism, like that intergroup pattern generally, is "an ideology, a general way of thinking about Jews [or outgroups] and Jewish-Gentile [outgroup-ingroup] interaction." That ideology consists of three principal elements: receptivity to negative imagery of Jews-out-group members, tendency to generalize those images, and an underlying perception of Jews-out-group members as threatening.<sup>62</sup> The ideology typically consists of negative nuclear ideas about Jews-out-group members (e.g., as clannish, conniving, money grubbing, unclean); these ideas in turn exert a kind of gravitational attraction for many other negative images, ideas, and rumors. By means of this receptivity to negative imagery, and a concomitant affective resistance to less hostile and stereotypic views, the anti-Semitic-authoritarian individual constructs an ideological schema into which each new derogatory characterization is assimilated.<sup>63</sup>

This ideology's imagery thus is stereotypic both in its content and expression. Authoritarians tend to ascribe a single trait to all members of the group (e.g., "Jews/out-group members are . . ."), to hold a negative impression of the entire group ("if you've seen one, you've seen them all"), and to embrace an ideology of inconsistent and contradictory elements and images (e.g., "Jews are accused of being excessively Jewish, so to speak, but their attempts to assimilate into 'Christian' activities are regarded as prying."<sup>64</sup>) This process yields a "stereotypy of interper-

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<sup>60</sup>The investigators first found a consistency of response to the Anti-Semitism (A-S) and Ethnocentrism (E) scales (as well as in other data): Persons who scored high on A-S, and thus manifested prejudice toward Jews, also tended to score high on E, and thus exhibited a more general level of intolerance and hostility for out-groups (rather than just a specific minority). The F scale originated in the investigators' interest in devising a scale to measure authoritarianism indirectly as a more general composite of personality traits underlying (a) the bias against specific minority groups manifested in the A-S scale and the prejudice against other out-groups and (b) submissive relation to authority figures explicitly covered by the E scale.

<sup>61</sup>Cherry & Byrne, *supra* note 56, at 111-12. For other studies considering authoritarianism in terms of ego development, see Deborah L. Browning, *Developmental Aspects of Authoritarian Attitudes and Sex Role Conceptions in Men and Women*, 68 *HIGH SCH. J.* 177 (1985); Deborah L. Browning, *Ego Development, Authoritarianism, and Social Status: An Investigation of the Incremental Validity of Loevinger's Sentence Completion Test (Short Form)*, 53 *J. PERSONALITY & SOC. PSYCHOL.* 113 (1987).

<sup>62</sup>ADORNO ET AL., *supra* note 51, at 92.

<sup>63</sup>*Id.* at 93.

<sup>64</sup>*Id.* at 62-63 (Offensiveness subscale).

sonal relationships and experiences, [involving] an inability to experience Jews [or out-group members] as individuals. Rather, each Jew [or out-group member] is seen and reacted to as a sort of sample specimen of the stereotyped, reified image of the group."<sup>65</sup>

According to the Berkeley Study, authoritarian intolerance is driven by "the idea that Jews [or out-group members] are *threatening*."<sup>66</sup> This threat is perceived on two levels. First, Jews-out-group members are seen as morally threatening or offensive—a source of contamination or corruption—"as violators of important values and standards."<sup>67</sup> The out-group members thus are regarded as value violators, whereas the in-group members are value preservers. The investigators concluded that Jews-out-group members in this connection become an object onto which authoritarians "project their unconscious [immoral] desires and fears."<sup>68</sup> Second, Jews-out-group members are seen as a social threat, as seeking to overwhelm. This level involves the authoritarian dilemma concerning power relationships.<sup>69</sup> Thus,

*Ethnocentrism is based on a pervasive and rigid ingroup-outgroup distinction; it involves stereotyped imagery and hostile attitudes regarding outgroups, stereotyped positive imagery and submissive attitudes regarding ingroups, and a hierarchical, authoritarian view of group interaction in which ingroups are rightly dominant, outgroups subordinate.*<sup>70</sup>

Ethnocentrism's pattern of stereotyping, often contradictory moralistic accusations, and usually unjustified perception of out-groups as threatening and power grabbing characterizes anti-Semitism, but is generalized even to groups with which the individual has not yet had any contact:

The conflict as [the authoritarian] sees it is between an ingroup trying to maintain or recapture its justly superior position, and an outgroup, resentful of past hurts, trying to do to others what they have done to it. But the conflict is seen as permanent and unresolvable; the only alternatives are dominance and submission. . . . Because he considers hierarchy and power conflict "natural" he has difficulty in grasping a conception of group relations in which power considerations are largely eliminated and in which no group can control the lives of other groups.<sup>71</sup>

Authoritarianism's "core construct" thus revolves around intense in-group identification and "generalized hostility or distrust towards outgroups."<sup>72</sup>

This pattern has been observed between groups defined by sex. Thus, high scorers on measures of authoritarianism tend to rate members of the opposite sex more negatively, and it appears that "high Authoritarians were discriminating against members of the opposite sex rather than in favor of members of the same

<sup>65</sup>*Id.* at 94 (internal quotations omitted).

<sup>66</sup>*Id.* at 95.

<sup>67</sup>*Id.*

<sup>68</sup>*Id.* at 96.

<sup>69</sup>This perception contributes to the contradictory, pseudodemocratic attempt to reconcile the urge to express hostility aggressively with the tendency to conform, at least superficially, to the democratic value of equality. The outcome is usually a demand for either assimilation or separation of the out-group, which are nonviolent ways of eliminating it, accompanied by strenuous efforts to prevent assimilation or conflict over separation. *Id.* at 99–100.

<sup>70</sup>*Id.* at 150.

<sup>71</sup>*Id.* at 148–49 (emphasis added).

<sup>72</sup>John Duckitt, *Social Class and F Scale Authoritarianism: A Reconsideration*, 68 HIGH SCH. J. 279, 285 (1985).

sex.”<sup>73</sup> In other words, although discrimination against women (or other subordinated groups) may be a common feature of the American social landscape, “the responses of low Authoritarians are nondiscriminatory and the behavior of high Authoritarians is significantly influenced by in-group/out-group identification.”<sup>74</sup>

Finally, in the context of intergroup relations, stereotypy manifests the authoritarian tendency toward rigid, categorical thinking. Most studies “find authoritarianism related to quite general beliefs, especially those reflecting intolerance and distrust.”<sup>75</sup> According to the Berkeley Study’s theoretical model, stereotypy evidences the ego’s inability to process complexity, ambiguity, and anxiety. The individual therefore resorts to relatively primitive defense mechanisms, such as splitting good characteristics from bad ones, to reconcile such tensions.<sup>76</sup> Similar values of opposite valence are ascribed wholesale to the in-group and out-group.<sup>77</sup> For example:

What is called power-seeking and clannishness in the outgroup is transformed into moral righteousness, self-defense, and loyalty in the ingroup. In all other respects the ingroup is regarded as the opposite of the outgroup: clean, unaggressive, hard-working and ambitious, honest, disciplined, well-mannered.<sup>78</sup>

A variant of this theme is the authoritarian tendency to attribute negative characteristics to out-group members as a justification for aggression toward them.<sup>79</sup> Studies of conformity have concluded that “authoritarian people judge others as all good or all bad and put them into ingroups or outgroups accordingly.”<sup>80</sup> Authoritarians thus tend to take a two-dimensional view of others and “are reluctant to believe that ‘good people’ can have both good and bad attributes.”<sup>81</sup>

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<sup>73</sup>John B. Campbell, *An Analysis and Demonstration of the Utility of Authoritarianism*, 68 HIGH SCH. J. 109, 112–13 (1985).

<sup>74</sup>*Id.*

<sup>75</sup>KIRSCHT & DILLEHAY, *supra* note 56, at 93.

<sup>76</sup>DSM-IV, *supra* note 57, at 751–57. Individual defense mechanisms are ranked hierarchically in order of increasing pathological impact under seven different defense levels: high adaptive level, mental inhibitions (compromise formation) level, minor image-distorting level, disavowal level, major image-distorting level, action level, and level of defensive dysregulation. The individual defense mechanism of splitting of the image of others into bad or good falls under major image-distorting level of defense.

<sup>77</sup>According to one review of the literature,

the anxieties inherent in large-group [i.e., too large for face-to-face encounters among all members at any one time] membership are even more intense than those associated with membership in small groups and . . . the fear of loss of ego boundaries is especially salient.

Thus, the defense of splitting—to cope with the conflicting feelings of insecurity, resentment, and hostility—is deployed more readily and powerfully by large groups. Thomas L. Morrison et al., *Manifestations of Splitting in the Large Group*, 125 J. OF SOC. PSYCHOL. 601, 602–03 (1985).

<sup>78</sup>ADORNO ET AL., *supra* note 51, at 149.

<sup>79</sup>See *infra* notes 91–99 and accompanying text.

<sup>80</sup>KIRSCHT & DILLEHAY, *supra* note 56, at 110.

<sup>81</sup>*Id.* at 84. Other research into personality and intolerance has suggested “a general factor of prejudice; intolerance toward various minority groups tends to be interrelated.” *Id.* at 85. Rokeach found that intolerance is related more to dissimilarity in belief structures than to race itself. *Id.* at 91. Subsequent research refined that work to conclude that participants will discriminate on the basis of belief structure when detailed information about beliefs is available, but will readily resort to ethnicity as a proxy for beliefs stereotypically assumed to be held by the outgroup. *Id.* at 91–92. For a law-and-economics analysis of the efficiency of using racial group membership as a proxy for a set of behavioral and cultural attributes, see Richard A. Posner, *The De Funis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1.



2. *Dominance and submission.* Whereas in-group chauvinism offers an ideological basis, dominance and submission provide behavioral vehicles for authoritarian fears and hostilities.<sup>82</sup> Authoritarian submission involves "a very general attitude . . . in relation to a variety of authority figures—parents, older people, leaders, supernatural power, and so forth."<sup>83</sup> This susceptibility to propagandistic manipulation by external agents has several aspects. In his factor-analytic reconceptualization of authoritarianism, Bob Altemeyer developed a three-part model of right-wing authoritarianism, which consists of "conventionalism," "authoritarian submission," and "authoritarian aggression."<sup>84</sup>

*Conventionalism* refers to the individual's adaptation to authoritatively established social conventions. According to the Berkeley group, general conventionalism, or "the individual's adherence to the standards of the collective powers with which he, for the time being, is identified," is distinguished from "mere acceptance of conventional values."<sup>85</sup> Authoritarians tend to endorse, often uncritically, the norms of the particular external agency with which they happen to be aligned; and they also tend to coerce others to adhere to those values.<sup>86</sup>

Another aspect involves compliance with the specific dictates of authority figures. As has been the case with many of the Berkeley Study's findings, compliance is sensitive to situational factors, such as role and status, as well as to individual differences.<sup>87</sup> For example, high F scale scorers tend to conform more and aggress less with figures whom they perceive as having high status or legitimacy.<sup>88</sup> The influence of situation and role on behavioral conformity is especially evident in

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<sup>82</sup>The emergence of fascistic and totalitarian regimes in Europe during the 1930s prompted intensive study of the phenomena of authoritarian submission and aggression. A brief overview of early obedience experiments, such as Jerome Frank's 1944 demonstration that an experimenter could induce participants to eat enormous quantities of soda crackers, and Solomon Asch's work on conformity, appears in ARTHUR G. MILLER, *THE OBEDIENCE EXPERIMENTS: A CASE STUDY OF CONTROVERSY IN SOCIAL SCIENCE* 15–19 (1986). Miller's book deals principally with Stanley Milgram's later obedience experiments.

Erich Fromm, for example, proposed that freedom in the 20th-century democratic industrialized state can be experienced either positively (freedom *to*)—as "strength and dignity of the self"—or negatively (freedom *from*)—as a "feeling of individual isolation and powerlessness." FROMM, *supra* note 54, at 122, 133. He believed that modern social, religious, economic, and political forces, while offering unprecedented opportunities for positive freedom and relief from material want, also created a strong potential for intolerable, widespread negative freedom, from which people would seek to escape. "The principal social avenues of escape in our time are the submission to a leader, as has happened in Fascist countries, and the compulsive conforming as is prevalent in [the United States]." *Id.* at 134. He argued that such escape from "[a]lone-ness, fear, and bewilderment" can manifest in the tendency toward both authoritarian submission and domination, or masochism and sadism.

<sup>83</sup>ADORNO ET AL., *supra* note 51, at 160.

<sup>84</sup>BOB ALTEMEYER, *RIGHT-WING AUTHORITARIANISM* 147–74 (1981); BOB ALTEMEYER, *ENEMIES OF FREEDOM: UNDERSTANDING RIGHT-WING AUTHORITARIANISM* (1988).

<sup>85</sup>ADORNO ET AL., *supra* note 51, at 159.

<sup>86</sup>Conventionalism, thus, is also closely linked both to authoritarian aggression (in that it can manifest in an inclination to coerce others to adhere to those values) and to rigidity and absolutism in adherence to the particular values of the group (and therefore includes elements of dogmatism). *See infra* notes 91–99 and accompanying text.

<sup>87</sup>For example, a review of the literature concluded that authoritarian tendencies become more evident when the individual faces "novel material, situations involving real concern, and the absence of structural constraint." KIRSCHT & DILLEHAY, *supra* note 56, at 46. Studies have also suggested that authoritarian attitudes could be mitigated by conflicting or competing social attachments. *Id.* at 61.

<sup>88</sup>Cherry & Byrne, *supra* note 56, at 125.

Stanley Milgram's controversial obedience experiments.<sup>89</sup> The audiences to whom Milgram presented his findings consistently underestimated how far participants would go in obeying the experimenter's commands to administer electric shocks to the "learner." In addition to the powerful influence of the experimenter's presence, Milgram found in a follow-up study another important situational factor: Personal distance between the participant-teacher and the victim-learner was inversely related to obedience.<sup>90</sup> In addition to situational effects, authoritarianism also emerged as an important individual factor. Milgram's later work found significantly higher F scale scores among obedient individuals and lower scores among defiant individuals. Furthermore, the obedient individuals exhibited ingratiating behavior toward the experimenter and hostile behavior toward the victim. Thus, when the social distance and depersonalization that result from stereotypy are combined with the tendency to submit to the control of authority figures (such as in-group leaders), the authoritarian process yields a strong proclivity toward authoritarian aggression.

*Authoritarian aggression*, the third component, therefore can be regarded as a mobilized conjunction of ethnocentrism and submission into the punitive expression of hostility that the authoritarian aims at out-groups.<sup>91</sup> The targets of authoritarian aggression tend to be violators of conventional values, especially mores concerning sexual behavior.<sup>92</sup> This focus is psychologically significant under the Berkeley group's theoretical model: It offers a moral justification for the authoritarian's superego-driven aggression and, because she or he attributes immorality to others even without a factual basis, such attribution and punitiveness is seen as a projection of the authoritarian's own unacceptable impulses.

Although authoritarians do not necessarily have significantly higher levels of overall aggression than egalitarians, authoritarians do favor punitive means to control others' behavior and tend to be more punitive toward lawbreakers. Authoritarians are also more punitive toward low-status victims and tend to take the victim's character into account in deciding levels of punitiveness when the victim is not aligned with authority.<sup>93</sup> Egalitarians, however, have been found to exhibit

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<sup>89</sup>Milgram observed, and subsequent studies confirmed, that people generally tend to underestimate the impact of situational forces and to overestimate the influence of personal or characterological factors—termed the *fundamental attribution error*. See generally MILLER, *supra* note 82, at 22–30.

<sup>90</sup>A.C. Elms & S. Milgram, *Personality Characteristics Associated With Obedience and Defiance Toward Authoritative Command*, 1 J. EXPERIMENTAL RES. PERSONALITY 282 (1966).

<sup>91</sup>The Berkeley Study distinguished authoritarian aggression from scapegoating, which involves more indiscriminate ventilation of frustration when the individual is intellectually confused about the frustration's source. Consistent with the process of authoritarian submission, the individual must direct authoritarian aggression against out-groups because in-group figures may not be attacked. ADORNO ET AL., *supra* note 51, at 162.

<sup>92</sup>Recall that the Berkeley Study defined *conventional values* as those values held by the authority source with which the authoritarian happens to align herself or himself. Two items regarding sexual mores from the authoritarian aggression portion of the F scale are as follows: "Homosexuality is a particularly rotten form of delinquency and ought to be severely punished" and "Sex crimes, such as rape and attacks on children, deserve more than mere imprisonment; such criminals ought to be publicly whipped." *Id.* at 161.

<sup>93</sup>Cherry & Byrne, *supra* note 56, at 126–27. For example, high F scale scorers tend to take character into account (are more punitive toward negatively than positively described victims) when the victim is a defendant. When the victim is a police officer, authoritarians disregard character. Reversed effects have been noted for egalitarians. *Id.* at 127–28. A variable that may facilitate expression of authoritarian aggression is "anti-intracception," which refers to an attitude of resistance to tender-mindedness and the

punitiveness when status or alignment with authority is reversed.<sup>94</sup> One writer has therefore suggested that "the authoritarianism–punitiveness relationship is modulated by social status differences and by perceived characteristics and beliefs of stimulus persons which differentially engage value systems of high and low authoritarians."<sup>95</sup>

Finally, the Berkeley Study noted the authoritarian's general inclination to see human relationships in terms of justified applications of power. This view is consistent with just-world theory, which holds that ethnocentric aggressors attribute negative characteristics toward the out-group victim as a means to justify their aggression.<sup>96</sup> One writer has suggested that (a) this belief system also includes the charge that, unlike the in-group, the out-group frustrates the processes of justice and fair play; (b) the in-group therefore is justified in resorting to facially unjust measures; and (c) authoritarian members of subordinated groups may also adopt this view to justify their aggression.<sup>97</sup>

Under the Berkeley Study's psychodynamic model, the individual's gravitation toward power figures is a function of the conflict generated by a weak ego: She or he feels the need both to submit to and to grasp for power, fearing it while nevertheless desiring it.<sup>98</sup> This process includes a sense of destructiveness and cynicism, manifested as the displacement of repressed aggression against out-groups and a generalized negative image of humankind (which image also helps to excuse aggression as simply human nature).<sup>99</sup> It includes the characteristic defense mechanism of distancing one's ego from unacceptable id impulses by projecting them onto others or seeing them in others rather than in one's self. The authoritarian's paranoid preoccupation with a perceived spread of evil in the world, sexual misconduct, and combinations of malign forces are viewed as a projection of the individual's own sexual and destructive urges.

*3. Closed-mindedness.* One of the major conceptual limitations of the Berkeley Study was its emphasis on right-wing authoritarianism. Milton Rokeach, in *The Open and Closed Mind*, therefore sought to develop a generalized theory of authoritarianism, that is, one not historically based on anti-Semitism and one that maintained its validity and coherence across the political spectrum.<sup>100</sup> He posited that authoritarianism inhered more in the structure of belief and disbelief systems than in their content. As a measure of individual differences in open- versus closed-mindedness, Rokeach offered his Dogmatism (D) scale.<sup>101</sup>

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subjective experience of emotion, fantasy, imagination, and aspirations of self and others. ADORNO ET AL., *supra* note 51, at 163–64.

<sup>94</sup>Cherry & Byrne, *supra* note 56, at 126–27.

<sup>95</sup>James L. May, *Authoritarianism and Applicant's Sex and Attitudes as Determiners of Perceived Need and Deservingness in a Charity Situation*, 68 HIGH SCH. J. 190, 191 (1985).

<sup>96</sup>See Qamar Hasan, *Dogmatism, Values and Intergroup Orientations*, 68 HIGH SCH. J. 341, 345 (1985).

<sup>97</sup>*Id.* at 345–46.

<sup>98</sup>ADORNO ET AL., *supra* note 51, at 166.

<sup>99</sup>*Id.* at 167.

<sup>100</sup>MILTON ROKEACH, *THE OPEN AND CLOSED MIND: INVESTIGATIONS INTO THE NATURE OF BELIEF SYSTEMS AND PERSONALITY SYSTEMS* (1960).

<sup>101</sup>Rokeach described belief and disbelief systems topographically. The *central region* consists of primitive core beliefs and disbeliefs not susceptible to confirmation by external authority. Everyone's *intermediate region* depends at least in part on external authorities for information beyond immediate experience, but people differ in the nature of authority relied upon and the extent of that reliance. One's general belief–disbelief system develops in this region, as does one's general attitude toward sources of

Dogmatism is defined by the extent to which one's belief-disbelief system is open or closed. That determination in turn depends on the degree to which a person distinguishes information from its source. In an open system, a person assesses and acts on information's intrinsic substantive merit (which operates directly to affect behavior) independently of irrelevant factors such as interpersonal or intergroup power issues (which impinge indirectly). In a closed system, the person does not distinguish those two aspects of information, and the person's closed-minded reliance on authority rests primarily not on that agency's intrinsic correctness but instead on its power to punish and reward. Closed systems are thus characterized by ardent rejection of disbelief systems, isolation and sharp differentiation between beliefs contrasted with poor differentiation between disbeliefs, and a belief-formation process marked by dependence on internal needs and reinforcement from external authority (such as in-group ideology). A core belief in a closed system is that the world is a threatening place; intermediately, other people are evaluated according to their relation to authority, power, and the in-group; and peripheral beliefs are subject to irrelevant influences.

According to Rokeach, belief-disbelief systems function to balance the cognitive need for information against the need to protect the psyche from threatening aspects of reality. Because everyone has both needs, openness versus closedness of the system is a function of the degree to which one or the other need predominates. In closed systems, the perception of the world as a threatening place is dominant and can lead to a sense of isolation and helplessness, an insatiable need for and yet fear of power, self-hate, and misanthropy. Of importance to the instant enquiry, which seeks to map the intrapsychic processes of authoritarianism onto a legal reform movement, Rokeach reasoned that if a perceived "threat leads to dogmatism in individuals, by the same token it should also lead to dogmatism in institutions. Dogma serves the purpose of ensuring the continued existence of the institution and the belief-disbelief system for which it stands."<sup>102</sup>

Closed belief-disbelief systems, whether individual or institutional, resist change to the total system (i.e., they have difficulty synthesizing or integrating beliefs into a contradictory new system).<sup>103</sup> Because their specific beliefs are isolated from one another and integrated primarily through reliance on authority, high D scale scorers are able to accept individual new beliefs (if endorsed by authority) and to reject isolated old ones (if apparently abandoned by authority). This seeming flexibility, however, is really a form of party-line thinking (the mediating effect of authority) and

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authority (e.g., unqualified acceptance or rejection vs. critical evaluation). In the *peripheral region*, each specific belief or disbelief derives from positive or negative authority.

Rokeach described the cognitive processing of information into belief-disbelief systems as working through those three levels. Information is first screened for its consistency with primitive beliefs and is rejected out of hand if inconsistent. Next, information is tested for its compatibility with intermediate beliefs. Cognitive narrowing happens in this region either by the individual's own avoidance of exposure or by an external authoritative agency's censorship. Finally, the specific screened and narrowed information is lodged in the peripheral region.

<sup>102</sup>ROKEACH, *supra* note 100, at 68. Rokeach applied this theory to an historical review of the Catholic Church's responses to perceived threats to its authority. He found a strong correlation between the degree of the perceived threat and the degree to which the Catholic system became closed, punitive, and absolutist. More recent writers have urged that dogmatism and authoritarianism are best understood as societal, rather than simply individual, phenomena. See *infra* notes 149–50 and accompanying text.

<sup>103</sup>*Rigidity*, by contrast, is defined by Rokeach as resistance to analytical change of individual beliefs.

has little impact on other core beliefs. Closed systems also are able to adopt new belief-disbelief systems wholesale, if presented authoritatively "on a silver platter."

Open systems, on the other hand, process information through intrinsic logical connections. In this way, specific core beliefs are integrated with one another, belief and disbelief systems communicate with each other, and there is less divergence between systems. Information challenging one belief, therefore, can affect other, related beliefs. Open systems thus are able to assimilate and synthesize new information into a fluid, integrated set of beliefs and disbeliefs. Because open-minded people tend to work through evaluation of information themselves, however, they are resistant to belief-disbelief systems presented on a silver platter. Because their beliefs are integrated rather than isolated, however, they are more able to detect contradictions between individual beliefs than are closed-minded people.

Rokeach's theory has, overall, held up well in subsequent research.<sup>104</sup> A number of studies indicate that the D scale, although not completely free of ideological effects, is much closer to a general measure of authoritarianism than the F scale.<sup>105</sup> High D scale scorers have demonstrated a significantly greater reliance on external authority, and less discrimination of information's content from its source, across a variety of experimental designs. For example, their judgment of the validity of syllogistic reasoning, evaluation of witness credibility, problem-solving ability in the face of novel information, and agreement with communications are all significantly influenced by others' status and authority.<sup>106</sup> One recent cross-cultural study of authoritarianism in American and post-Soviet Russian samples found conventionalism, not ideological content, to be a key attribute of authoritarianism.<sup>107</sup>

High D scale scorers are more inclined to stereotypy and prejudice.<sup>108</sup> Individuals who are inclined to be submissive to institutional authority also tend to be "intolerant of ambiguity and complexity, are dogmatic, and report little creative independence."<sup>109</sup> Moreover, high D scale scorers are more easily persuaded by social influence to change specific beliefs, although investigators have obtained conflicting results in testing Rokeach's theories of belief-disbelief isolation and integration.<sup>110</sup> Finally, high D scale scorers have difficulty processing, and tend to resist, belief-discrepant information, at least for social objects of high ideological

<sup>104</sup>Ralph B. Vacchiano, *Dogmatism*, in PERSONALITY VARIABLES IN SOCIAL BEHAVIOR, *supra* note 56, at 281, 282 ("In general, research tends to support Rokeach's concept"). One study has offered a refinement of the notion of dogmatism in terms of orthodoxy. Jean-Pierre Deconchy, *From the Construct of "Dogmatism" to the Construct of "Orthodoxy": The Articulation of the Subject and the Group within the Ideological Field*, 68 HIGH SCH. J. 327, 330 (1987) ("in an orthodox system, the rational fragility of information is functionally counter-balanced by the strictness of social control").

<sup>105</sup>Vacchiano, *supra* note 104, at 282, 286. High D scorers, however, tend to be inclined more toward political and social conservatism; but that "conservatism is a far cry from an extreme racist conservatism." *Id.* at 292.

<sup>106</sup>*Id.* at 286-89.

<sup>107</sup>Sam G. McFarland et al., *Authoritarianism in the Former Soviet Union*, 63 J. PERSONALITY AND SOC. PSYCHOL. 1004 (1992).

<sup>108</sup>Vacchiano, *supra* note 104, at 289-91. The hypothesis that attraction is a function of attitude similarity for high D scale scorers, however, is in some doubt. *Id.* at 301.

<sup>109</sup>E.E. Rump, *Personality Ramifications of Attitude to Authority: Studies in Australia and Italy*, 68 HIGH SCH. J. 287, 288 (1985). Furthermore, "[i]ndividuals with strong religious and authoritarian beliefs tend to be more rigid and dogmatic in their attitudes about morally controversial behaviors." Roger C. Katz et al., *Findings on the Revised Morally Debatable Behaviors Scale*, 128 J. PSYCHOL. 15, 17 (1993).

<sup>110</sup>Vacchiano, *supra* note 104, at 293-96.

relevance and at least until the person makes a party-line or silver-platter conversion.<sup>111</sup>

The personality profile predicted by Rokeach's model of belief-disbelief systems has also found support in other studies. "As a defense against negative self-beliefs, the more close-minded person was postulated to be self-proselytizing, as manifested by the compulsive repetition of beliefs, and to engage in self-aggrandizing behavior, as indicated by a need for status and power and a sense of moral self-righteousness."<sup>112</sup> In general, dogmatism is positively related to anxiety, defensiveness, impulsivity, negativity toward self and others, and need for support and encouragement from others.<sup>113</sup> And, like high F scale scorers, dogmatic individuals tend to be submissive, conforming, and unreceptive to others' feelings.<sup>114</sup>

One study found that authoritarianism not only spans the ideological spectrum (although it is somewhat more concentrated toward the right) but also the continuum of political extremity and activism. "One can find authoritarians equally among political 'moderates' and 'radicals' . . ." and "among 'passives' and 'actives'."<sup>115</sup> Furthermore, authoritarians of both the right and left tend to be intolerant of and punitive toward perceived enemies. Leftist authoritarians' aggression, especially in the form of censorship, tends to be more ideologically directed and less generalized than does that of rightist authoritarians; leftist authoritarians appear to be more intolerant and aggressive toward ideological opponents than do nonauthoritarian leftists; and rightist authoritarians tend to be motivated more by general hostility than do nonauthoritarian rightists.<sup>116</sup>

Finally, proponents of a dimensional, five-factor model of personality have suggested that the constructs of authoritarianism and closed-mindedness can be described by their model. For example, they have proposed that "rigidity of cognitive and emotional style, intolerance of ambiguity, extreme needs for cognitive closure, and preference for simplicity" correspond to a low rating on the factor of openness (particularly openness to experience and ideas).<sup>117</sup> Five-factor theorists have also suggested that authoritarian aggression is linked to relatively low scores on the trait of agreeableness.<sup>118</sup>

4. *Sexuality.* The Berkeley group suggested that ego-alien sexuality is a key authoritarian variable. They posited that authoritarians evince "[a] strong inclination to punish violators of sexual mores (homosexuals, sex offenders)." This tendency

<sup>111</sup>*Id.* at 305; KIRSCHT & DILLEHAY, *supra* note 56, at 44-45.

<sup>112</sup>Dorothy E. Lee & Howard J. Erlich, *Beliefs About Self and Others: A Test of the Dogmatism Theory*, 28 PSYCHOL. REP. 919 (1971), *quoted in* Vacchiano, *supra* note 104, at 297-98.

<sup>113</sup>Vacchiano, *supra* note 104, at 297-98; KIRSCHT & DILLEHAY, *supra* note 56, at 48-50. For an early description of aspects of these personality traits, see KAREN HORNEY, *THE NEUROTIC PERSONALITY OF OUR TIME* (1937). For discussion of the role of closed-mindedness in self-righteousness, see Toni Falbo & James A. Shepperd, *Self-Righteousness: Cognitive, Power, and Religious Characteristics*, 20 J. RES. IN PERSONALITY 145 (1986).

<sup>114</sup>Vacchiano, *supra* note 104, at 297-98.

<sup>115</sup>Edwin N. Barker, *Authoritarianism of the Political Right, Center, and Left*, 19 J. SOC. ISSUES, April 1963, at 63, 72-73.

<sup>116</sup>*Id.*

<sup>117</sup>Paul T. Costa, Jr. & Thomas A. Widiger, *Summary and Unresolved Issues*, in PERSONALITY DISORDERS AND THE FIVE-FACTOR MODEL OF PERSONALITY 319, 323 (Paul T. Costa, Jr. & Thomas A. Widiger eds., 1994).

<sup>118</sup>PAUL T. COSTA, JR. & ROBERT R. MCCRAE, *REVISED NEO PERSONALITY INVENTORY: PROFESSIONAL MANUAL* 15 (1992).

may indicate both "a general punitive attitude based on identification with ingroup authorities" and that the "subject's own sexual desires are suppressed and in danger of getting out of hand." The authoritarian's readiness to believe in the proliferation of sexual misbehavior, even without a factual basis, is related to projectivity, as described earlier.<sup>119</sup> Rokeach's model suggests how a closed-minded system, operating from a core belief such as "sex is dangerous," processes information and deploys strategies consistently with that belief—for example, by denying or avoiding ambiguity-creating information.

Subsequent research has "consistently verified that authoritarians respond negatively to many aspects of sex."<sup>120</sup> Thus, "[o]ne of the concerns of authoritarians is the disapproval of sexual stimulation, 'unacceptable' sexual expression, and a desire to control the sexuality of others."<sup>121</sup> A series of studies has suggested "that erotophobia is related to personality measures involving generalized value orthodoxy, including authoritarianism, traditional sex roles, need for achievement, sex guilt, and negative reactions to masturbation and homosexuality."<sup>122</sup>

One early study, for example, supports the Berkeley group's foundational proposition that authoritarians defend against conflicts and ambivalence surrounding sexual and aggressive feelings through repression.<sup>123</sup> Assuming that repression can be operationally defined in perceptual terms, Nathan Kogan found an inverse relationship between the ability to identify sexual and aggressive stimuli and the strength of authoritarian attitudes.<sup>124</sup> He further suggested that

the distinctive personalities of authoritarians and nonauthoritarians make for differences in the subjective acceptability or "threateningness" of the stimuli. Nonauthoritarians who are allegedly capable of accepting their own sexual and aggressive impulses should perceive stimuli embodying such impulses as less threatening.<sup>125</sup>

In other words, authoritarians deal with their negative feelings about sexuality by attempting to eliminate it from their consciousness.

Censorship might usefully be regarded as the functional equivalent of repression in the public realm. It seeks to keep out of collective consciousness images that are deemed threatening and renders the repressive process itself largely invisible by masking it with pretextual justifications.<sup>126</sup> For authoritarians, "sexual arousal is a negative experience and one that should be severely limited and controlled. Legal

<sup>119</sup>ADORNO ET AL., *supra* note 51, at 169–70.

<sup>120</sup>DONN BYRNE & KATHRYN KELLEY, *AN INTRODUCTION TO PERSONALITY* 187 (3d ed. 1981).

<sup>121</sup>Kathryn Kelley, *Sexuality and Hostility of Authoritarians*, 68 HIGH SCH. J. 173, 173 (1985).

<sup>122</sup>William Fisher et al., *Erotophobia–Erotophilia as a Dimension of Personality*, 25 J. SEX RES. 123, 134 (1988). See also Virginia Greenlander, *Authoritarianism as a Predictor of Response to Heterosexual and Homosexual Erotica*, 68 HIGH SCH. J. 183, 185 (1985) ("individuals high in authoritarianism were more erotophobic, were more homophobic, felt more sexually guilty, and held more negative attitudes toward masturbation and toward homosexuals than did individuals low in authoritarianism").

<sup>123</sup>*Repression* is defined as follows: "[t]he individual deals with emotional conflict or internal or external stressors by expelling disturbing wishes, thoughts, or experiences from conscious awareness. The feeling component may remain conscious, detached from its associated ideas." *DSM–IV*, *supra* note 57, at 756.

<sup>124</sup>Nathan Kogan, *Authoritarianism and Repression*, 53 J. ABNORMAL & SOC. PSYCHOL. 34 (1956).

<sup>125</sup>*Id.* at 37.

<sup>126</sup>For an example of the facility with which such justifications can be deployed, see *supra* notes 33–34 and accompanying text (discussing "secondary effects" doctrine).

restrictions on erotic stimuli would serve as a protection against such arousal."<sup>127</sup> For example, one study compared the responses to erotic stimuli of authoritarian and egalitarian married couples. Although the study noted some uncertainty in the literature concerning whether authoritarians differ from egalitarians in the level of arousal in response to such material, it confirmed the overall hypothesis that authoritarians exhibit a "general negative orientation toward human sexuality": "Authoritarian couples exhibited a greater negative emotional reaction to the stimuli, labeled more themes pornographic, and advocated greater censorship of the materials than egalitarian couples."<sup>128</sup>

Authoritarians' propensity to censor when repression is unavailable—that is, coercively to externalize intrapsychic defense mechanisms when necessary—is further evinced by their significantly lower obscenity threshold. In other words, authoritarians are much more likely to rate stimuli as legally censorable than are nonauthoritarians.<sup>129</sup> This lower obscenity threshold of authoritarians supports free speech advocates' fears that censorship can indeed be a slippery slope.

In one study, researchers exhibited slides of renowned art works containing nude figures (including paintings by Modigliani, Manet, Gauguin, and Picasso) to subjects who had been sorted by F scale scores.<sup>130</sup> The 219 subjects, 89 male and 130 female full-time liberal arts college students and part-time business students, were asked to rate the pictures as pornographic or not.<sup>131</sup> The results showed a statistically significant positive correlation "between authoritarian personality structure and seeing pornography in accepted great art."<sup>132</sup>

Authoritarians react negatively not only to nudity and sexual themes generally, but especially to material that depicts unconventional sexual behavior. Several studies have found that authoritarians exhibit strong negative feelings when presented with stimuli featuring unconventional or nontraditional sexual themes. For example, one study interpreted the strong negative reaction of high F scale scorers to pictures of same-sex masturbation as related to conventional taboo surrounding that theme.<sup>133</sup>

<sup>127</sup>BYRNE & KELLEY, *supra* note 120, at 189.

<sup>128</sup>*Husband-Wife Similarity*, *supra* note 5, at 391–92.

<sup>129</sup>In the married couples' study, for example, authoritarian couples' tendency to label the sexual stimuli negatively as *pornographic* exceeded that of the nonauthoritarian couples at a very high level of statistical significance ( $p < .0004$ ), as did their advocacy of legal restrictions for sexual material ( $p < .002$ ). *Id.* at 389. The study's use of the term *pornographic* was understood to imply censorship.

<sup>130</sup>The first-round pictures were as follows: Anders Zorn, "The Three Graces"; Modigliani, "Reclining Nude"; Gauguin, "Women with Mangoes"; Picasso, "Woman Dressing Her Hair"; Peterich, "Reposing Boy"; Volkman, "Seated Man"; Chabas, "September Morn"; Modigliani, "Nude, 1922"; Hildebrand, "Male Figure"; Fouquet, "Virgin and Child"; Ingres, "Odalisque"; Manet, "Olympia"; Manet, "Picnic on the Grass." A second experiment was run in which the Peterich was eliminated and the following paintings added: Titian, "Venus and Adonis"; Boucher, "Venus at Her Toilet"; Picasso, "Nude, 1936"; Cranach, "Judgment of Paris." W.G. Eliasberg & I.R. Stuart, *Authoritarian Personality and the Obscenity Threshold*, 55 J. SOC. PSYCHOL. 143, 145, 147 (1961).

<sup>131</sup>No definition of the term was provided. Initial runs had convinced the experimenters that participants did not need a definition of the term or a substitution of the term *obscene*.

<sup>132</sup>Eliasberg & Stuart, *supra* note 130, at 147. The authors also noted that "there were no cases where subjects saw more than 10 of the 13 pictures as pornographic. However, only 16 per cent of this supposedly sophisticated group saw no pornography at all." *Id.* (emphasis added).

<sup>133</sup>BYRNE & KELLEY, *supra* note 120, at 189; Kelley, *supra* note 121, at 173–75. Another study, discussed in more detail below, also supports this point. William Griffitt, *Response to Erotica and the Projection of Response to Erotica in the Opposite Sex*, 6 J. EXPERIMENTAL RES. PERSONALITY 330 (1973).



Censorship might be seen as a public version not only of the defense mechanism of repression but also that of displacement of aggression.<sup>134</sup> "Because authoritarians are extremely negative toward any sexual behavior they consider deviant and because they tend to aggress against those who violate [in-group] social norms," they are inclined to be more punitive toward unacceptable sexuality.<sup>135</sup> For example, authoritarians imposed a longer prison term, allowed fewer visits, and rated more negatively a hypothetical defendant charged with showing his 13-year-old daughter obscene photographs and engaging in mutual genital fondling with her than did nonauthoritarians. When the defendant was charged with beating the child with his fists and belt until she was black and blue, however, authoritarians were no more punitive than their nonauthoritarian counterparts. "It took a sexual offense to bring out this difference in willingness to punish the guilty person."<sup>136</sup>

Finally, William Griffitt's study of the relationship between sex differences in response to erotica, projection, and authoritarianism provides a point of departure for application of this literature to the MacKinnon-Dworkin project.<sup>137</sup> Griffitt explored three sets of issues: sex differences in self-reported responses to specific sexual themes, differences in male and female assumptions about the responses to erotica of the respective opposite sexes, and the interaction between F scale scores and those variables.<sup>138</sup>

First, it appears that although sexually explicit material is arousing to both men and women, the two groups differed in the specific themes that they found arousing, and the females reported a greater level of aversion to the material.<sup>139</sup> Contrary to the findings of Kinsey et al., but consistently with other studies, Griffitt found little difference between men and women in overall arousal (total reactivity) across sexual themes:<sup>140</sup> "[F]emales are as likely as males to experience sexual arousal when exposed to visual and literary erotica."<sup>141</sup> Men and women differed significantly,

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Recall that the Berkeley Study conceived of conventionality in terms of in-group norms, and that the F Scale is skewed toward rightist authoritarianism. See *supra* notes 85–86, 91–92, 100, and accompanying text.

<sup>134</sup>Displacement is defined as follows: "[t]he individual deals with emotional conflict or internal or external stressors by transferring a feeling about, or a response to, one object onto another (usually less threatening) substituted object." *DSM-IV*, *supra* note 57, at 755.

<sup>135</sup>BYRNE & KELLEY, *supra* note 120, at 190.

<sup>136</sup>*Id.* at 190–91.

<sup>137</sup>Griffitt, *supra* note 133.

<sup>138</sup>Griffitt showed his participants (who previously had completed an F scale and self-report scales on affective state) 19 slides depicting various heterosexual, homosexual, and autosexual acts. Each participant first was asked to report the degree to which each slide was sexually arousing to her or him, whether each slide was pornographic (defined as "obscene or licentious; foul, disgusting, or offensive; tending to produce lewd emotions"), the extent to which the majority of the slides should be legally restricted, the subject's willingness to return to view movie versions of the 19 items in another experiment, and background data. In the second phase, participants were shown the slides again, and both self-rated (actual) and projected responses were obtained. *Id.* at 332.

<sup>139</sup>In addition to the Griffitt study, see the literature cited in Kathryn Kelley et al., *Three Faces of Sexual Explicitness: The Good, the Bad, and the Useful*, in *PORNOGRAPHY: RESEARCH ADVANCES AND POLICY CONSIDERATIONS* 57, 72 (Dolf Zillmann & Jennings Bryant eds., 1989) (noting that women are aroused by exposure to sexually explicit material, although they tend to prefer thematically different material than do men).

<sup>140</sup>Griffitt, *supra* note 133, at 335. In addition to the research cited by Griffitt, the married couples' study also supports this conclusion. See *supra* note 129.

<sup>141</sup>Griffitt, *supra* note 133, at 330.

however, in the themes they considered arousing.<sup>142</sup> And women—perhaps manifesting greater ambivalence about their own sexual arousal in response to the material<sup>143</sup>—reported significantly greater feelings of disgust, anger, and nausea; expressed greater tendency to rate the stimuli pornographic; and were more restrictive.

Second, women projected more arousal to men but were less accurate in their projections. Significant differences emerged in the arousal projected by each group to the other in the degree of arousal attributed to the opposite sex, in the basis for such assumptions, and in the accuracy of the projections. “Females project significantly greater feelings of sexual arousal, entertainment, and excitement to males than males project to females.”<sup>144</sup> Men’s projections, however, were more influenced by their own reactions to the stimuli than were women’s projections.<sup>145</sup> Nevertheless, men were generally more accurate in their projections than women for reactivity to specific themes, overall reactivity, and emotional responses.<sup>146</sup> Third, sex differences also emerged when F scale scores were correlated with projections. Although men’s scores were unrelated to projections for women for any themes, high-authoritarian women projected significantly more arousal to men on certain themes than did low-scoring women. Griffitt concluded that “[f]emale authoritarians assume that males are sexually aroused by the ‘unacceptable’ but not by the ‘traditional’ behaviors.”<sup>147</sup> Authoritarians of both sexes projected greater levels of negative emotional responses than did nonauthoritarians.

### III. Authoritarianism and the Feminist Antipornography Movement

#### A. Introduction

Before I apply the foregoing concepts to *Only Words*, a few preliminary observations are in order. First, the following analysis is not an *ad feminine* commentary. The Berkeley Study, “limited as it [was] to the hitherto largely neglected psychological aspects of fascism, [did] not concern itself with the production of propaganda. It focus[ed] attention, rather, upon the consumer, the individual for whom the propaganda is designed.”<sup>148</sup> By the same token, this article is

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<sup>142</sup>Men reported greater arousal than did women from the following themes: a woman wearing a revealing blouse and skirt; oral-genital contact, two women and one man; oral-genital contact, woman on man; nude female masturbating; and nude woman. Male participants reported that the nude female slide was the most arousing and a man wearing undershorts was the least arousing. Women reported greater arousal than did men from the slides of a man in undershorts and a nude man; the most arousing for women was a partially clad man and woman engaged in petting, and the least arousing was anal intercourse by two men. *Id.* at 332–33.

<sup>143</sup>The speculation in the text is mine, not Griffitt’s.

<sup>144</sup>Griffitt, *supra* note 133, at 336.

<sup>145</sup>*Id.*

<sup>146</sup>Griffitt, thus, concluded that

Male and female inaccuracies . . . appear to be a function of differing projection strategies. While males appear to base their assumptions concerning female responses on their own reactions but are not generally inaccurate in an absolute sense concerning “females in general,” females tend to be inaccurate in their assumptions concerning the responses of “males in general” but their assumptions are less related to “personal” reactions than are those of the males.

*Id.* at 336.

<sup>147</sup>*Id.* at 335 (emphasis added).

<sup>148</sup>ADORNO ET AL., *supra* note 51, at 7–8 (emphasis added).

concerned with the psychological forces to which the MacKinnon–Dworkin position appeals; it does not purport to be a personality profile of any particular individual. Instead, just as *Only Words* has almost nothing to say about the thoughts, feelings, reactions, and motivations of pornography producers and a great deal to say about the alleged responses of pornography’s consumers (even though the proposed ordinance would impose liability on the former rather than the latter class), the focus here is, likewise, on the potential impact of the MacKinnon–Dworkin proposal, rather than on its principal authors. Of course, an integral part of this enquiry is an understanding of the content as well as the structure of arguments such as those offered in *Only Words*; but the ultimate concern is with the consequences of the coercive legal mandate of its viewpoint.

Second, although authoritarianism has generally been studied from an individual-differences perspective, it can also be considered “as *societal* pathology, arising from the very normal and everyday workings of institutions.”<sup>149</sup> Indeed, the Berkeley Study originally was concerned with potentially fascistic tendencies among the normal U.S. population. From this viewpoint, as Stanley Milgram’s obedience experiments showed, willingness to submit to authority’s commands to aggress against others is a propensity shared (albeit in varying degrees) by most people:

We are all authoritarians. We all possess the authoritarian personality. We are all, in some sense, obedient slaves and cheerful robots. Simply to be alive in this century is to be a citizen of an authoritarian society and an increasingly authoritarian world.<sup>150</sup>

Thus, to the extent that the MacKinnon–Dworkin position appeals to the authoritarian in each of us or to the authoritarians among us, its adoption by the state will help to make this an increasingly authoritarian world.

The authoritarian pattern of in-group–out-group relations, concern with power, and closed-mindedness pervades works like *Only Words*. Those elements interact in the psychologically charged domain of sexuality, which is such a salient issue for authoritarianism and is the central focus of the feminist antipornography campaign. Each of these topics is discussed below.

### *B. In-Group–Out-Group Relations*

First, the MacKinnon–Dworkin approach, and that of many advocates of anti-hate speech regulations, identifies out-groups described by race, sex, and ethnicity as the source of the in-group’s difficulties (in-group, that is, from such advocates’ perspective). In this way, assessment of the perceived problem, justification for group-oriented remedial measures, and rebuttal of any challenges all are largely dependent on stereotypy.

Most literally, *Only Words* is written in us-versus-them terms; the book is about harm inflicted on one group by another.<sup>151</sup> It describes a world in which men (an undifferentiated, stereotyped out-group) are aggressive perpetrators and women (an

<sup>149</sup>Peter J. Freitag, *The Authoritarian Society*, 68 HIGH SCH. J. 103, 105 (1985).

<sup>150</sup>*Id.* at 105. See also Oesterreich, *supra* note 54, at 99 (asserting that “it is necessary to relate psychological concepts directly to socialization processes, to the individual experiences people have made in their lives,” and suggesting that the conventional individual-differences model is society’s defense against perceiving itself as authoritarian).

<sup>151</sup>The same observation applies to other writings in this genre as well. See, e.g., *infra* notes 358–84 and accompanying text.

undifferentiated, stereotyped in-group) are passive victims.<sup>152</sup> All of the relevant harm described in the book is inflicted by men on women (and children). Recall that erotophobia and authoritarianism have both been related to conventional sex role stereotypes.<sup>153</sup>

Indeed, this belief is coded into the book's grammatical structure: It frequently speaks through the active voice when referring to men (men do things) and the passive voice when referring to women (women have things done to them).<sup>154</sup> This structure is evident not only in the book's many lurid descriptions of violence, but also in its imagery of more conventional sex acts performed in pornography. For example, in a single six-sentence paragraph attacking application to pornography of the content-based-content-neutral distinction of First Amendment law, the book no less than a half-dozen times explicitly invokes the image of a "penis ramming into a vagina."<sup>155</sup> Female participants in the production of pornography "regularly take drugs to get through it" and only pretend to enjoy it, but the men, because they have (visible) erections, must really be hedonically engaged.<sup>156</sup>

More fundamentally, the book's intergroup orientation is evident in its basic premises concerning inequality. The world is divided into two simple classes, the dominant (men, mostly White) and the subordinate (women, people of color); and equality is a matter of ending group disadvantage rather than discrimination.<sup>157</sup>

Several important corollaries follow from those dualistic premises. First, personal responsibility for one's conduct is seen mostly as a matter of the group with which one is identified. *Only Words* argues that all pornography (even the kind showing no overt violence) inevitably coerces and exploits the women who participate in its production. Women are, by definition, inherently coerced with respect to sex. They do not really consent because "[e]mpirically, all pornography is made under conditions of inequality based on sex, overwhelmingly by poor, desperate, homeless, pimped women who were sexually abused as children. . . . These conditions constrain choice rather than offering [sic] freedom."<sup>158</sup> *Only Words* therefore

<sup>152</sup>For example, in rebutting the suggestion that suppression of pornography involves the suppression of ideas, ONLY WORDS argues:

It is for pornography, and not by the ideas in it, that women are hurt and penetrated, tied and gagged, undressed and genitally spread and sprayed with lacquer and water so sex pictures can be made. Only for pornography are women killed to make a sex movie, and it is not the idea of a sex killing that kills them. . . . Similarly, on the consumption end, it is not the idea in pornography that assault women: men do, men who are made, changed, and impelled by it.

ONLY WORDS, *supra* note 6, at 15.

<sup>153</sup>See *supra* notes 73, 122–47, *infra* note 358, and accompanying text.

<sup>154</sup>The same theme appears as well in CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 52 (1987).

<sup>155</sup>Suppose that the sexually explicit has a content element: it contains a *penis ramming into a vagina*.

Does that mean that a picture of this conveys the idea of a *penis ramming into a vagina*, or does the viewer see and experience a *penis ramming into a vagina*? If a man watches a *penis ram into a vagina* live, in the flesh, do we say he is watching the idea of a *penis ramming into a vagina*? How is the visual pornography different? When he then goes and *rams his penis into a woman's vagina*, is that because he has an idea, or because he has an erection? I am not saying that his head is not attached to his body; I am saying his body is attached to his head.

ONLY WORDS, *supra* note 6, at 23–24 (emphases added).

<sup>156</sup>*Id.* at 27.

<sup>157</sup>FEMINISM UNMODIFIED, *supra* note 154, at 32–45. For an overview of the distinction between the group-disadvantaging and antidiscrimination principles, see Donald P. Judges, *Light Beams and Particle Dreams: Rethinking the Individual vs. Group Rights Paradigm in Affirmative Action*, 44 ARK. L. REV. 1007, 1009–17 (1991).

<sup>158</sup>ONLY WORDS, *supra* note 6, at 20.

justifies the legislation it advocates as a law "to stand behind a comparatively powerless group in its social fight for equality against socially powerful and exploitative groups."<sup>159</sup>

Second, under this view not only what one does but also what one says is evaluated in terms of one's group membership. Equating pornography with hate speech,<sup>160</sup> MacKinnon expressly aligns herself with legal scholars such as Mari Matsuda, who advocates an "Outsider's Jurisprudence," which is, in some respects, overtly ethnocentric from its own in-group perspective: It "rejects presentist, androcentric, Eurocentric, and false-universalist descriptions of social phenomena, [and] offers a unique description of law."<sup>161</sup> Matsuda's approach, although not specifically concerned with pornography, reflects the authoritarian processes of in-group identification and punitive aggression toward the out-group that appears in *Only Words*. A brief look at Matsuda's views thus helps to illustrate the implications of the MacKinnon-Dworkin position.

From Matsuda's viewpoint, the in-group consists of the Outsiders (groups that have historically been oppressed and subordinated); the out-group consists, presumably, mainly of straight White men. In-group members are real people with stories to tell, the legitimacy of which is largely a function of their group membership.<sup>162</sup> They need legal protection to have their voices heard. Out-group members' efforts to participate in dialogue—whether in support or criticism of either Outsider Jurisprudence or hate speech—are inherently suspect by virtue of their group membership.<sup>163</sup> They are said to exploit the existing legal structure to silence the in-group.

Third, the nature of this Outsider's Jurisprudence reaches its logical conclusion in its proposal that one's access to legal remedies should likewise depend upon one's group identity. In this way, aggression against individual out-group members (in the form of coercive legal measures) is justified, in true authoritarian fashion, on the basis of stereotypic assumptions about the group. One person is presumed to be oppressed and dominated—and therefore to require special legal empowerment—because of one's membership in a class that has, as a group, historically experienced oppression. Another person is presumed to be an oppressor—and thus to require legal restraint—for the inverse reason.<sup>164</sup>

Matsuda advocates a kind of just-world affirmative action program for hate speech. Racist speech by members of her out-group is a crime, whereas racist speech by members of her in-group is "a victim's struggle for self-identity in response to

<sup>159</sup>*Id.* at 103. These points converge when *ONLY WORDS* argues that

Pornography makes the world a pornographic place through its making and use, establishing what women are said to exist as, are seen as, are treated as, constructing the social reality of what a woman is and can be in terms of what can be done to her, and what a man is in terms of doing it.

*Id.* at 25.

<sup>160</sup>"Hate speech and pornography do the same thing: enact the abuse." *Id.* at 104.

<sup>161</sup>Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2324 (1989).

<sup>162</sup>*Id.* at 2326–31. For critique of this kind of ethnocentrism, see Donald P. Judges, *Bayonets for the Wounded: Constitutional Paradigms and Disadvantaged Neighborhoods*, 19 HASTINGS CONST. L.Q. 599, 654–57 (1992).

<sup>163</sup>Matsuda, *supra* note 161, at 2326–27. See also, e.g., Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1337–38 (1986) (arguing that opponents of affirmative action are not just adversaries in a good-faith debate over means occurring within a consensus of opposition to racial injustice, but are instead enemies whose objective is White supremacy).

<sup>164</sup>A similar process manifests in the context of affirmative action. See Judges, *supra* note 157.

racism” and therefore immune from punishment under a so-called victim’s privilege.<sup>165</sup> A similar perspective emerges in *Only Words*, both rhetorically and substantively. The book objects to the equation of injury claims by members of “those [groups] with less power” to claims by members of “those [groups] with more power, as if sexual epithets against straight white men were equivalent to sexual epithets against women.”<sup>166</sup> And its proposed cause of action in effect assumes that pornography inflicts group-based harm, and it correspondingly offers a group-oriented remedy.

### C. Concern With Power and Dominance

“[M]en have power and women do not.”<sup>167</sup> That is the bedrock premise on which the MacKinnon–Dworkin view is based. That perspective rigidly insists (despite considerable evidence to the contrary) that: the notion of female power is therefore an oxymoron; “[f]eminism has not changed the status of women”; and “[o]ne is not socially permitted to be a woman and neither doormat nor man.”<sup>168</sup> Pornography must be suppressed because it epitomizes how “sexuality arises in relations under male dominance,” which “eroticizes the despised, the demeaned, the accessible, the there-to-be-used, the servile, the child-like, the passive, and the animal. *That* is the content of the sexuality that defines gender female in this culture, and the visual thingification is its method.”<sup>169</sup>

Male dominance, pornography, and violence against women are all equated in *Only Words*: “With pornography, men masturbate to women being exposed, humiliated, violated, degraded, mutilated, dismembered, bound, gagged, tortured, and killed.”<sup>170</sup> Proceeding from its assumptions that women are powerless and pornography is murder, *Only Words* portrays the question of free speech as a caricature of power imbalance: “How many women’s bodies have to stack up here even to register against male profit and pleasure presented as First Amendment principle?”<sup>171</sup>

Under the Dworkin–MacKinnon analysis, then, First Amendment principle is really only more male domination of women masquerading as liberty-talk:

The First Amendment essentially presumes some level of social equality among people and hence essentially equal social access to the means of expression. In a context of inequality between the sexes, we cannot presume that that is accurate. The First Amendment also presumes that for the mind to be free to fulfill itself, speech must be free and open. Andrea [Dworkin’s] work shows that pornography contributes to enslaving women’s minds and bodies. As a social process and as a form of “speech,” pornography amounts to terrorism and promotes not freedom but silence. Rather, it promotes freedom for men and enslavement and silence for women.<sup>172</sup>

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<sup>165</sup>Matsuda, *supra* note 161, at 2362–63. Matsuda conceded that “[t]he victim’s privilege becomes problematic when it is used by one subordinated person to lash out at another.” *Id.* at 2363. The target’s group identity is the determinative factor; even if the “hateful speech . . . comes from an experience of oppression,” Matsuda would prohibit it when directed at a member of her in-group. *Id.* at 2363–64.

<sup>166</sup>ONLY WORDS, *supra* note 6, at 105.

<sup>167</sup>FEMINISM UNMODIFIED, *supra* note 154, at 51. ONLY WORDS draws heavily from views expressed in FEMINISM UNMODIFIED.

<sup>168</sup>FEMINISM UNMODIFIED, *supra* note 154, at 2, 8, and 53.

<sup>169</sup>*Id.* at 53–54.

<sup>170</sup>ONLY WORDS, *supra* note 6, at 17.

<sup>171</sup>*Id.* at 22.

<sup>172</sup>FEMINISM UNMODIFIED, *supra* note 154, at 129–30.

Under this view, "[s]peech theory does not disclose or even consider how to deal with power vanquishing powerlessness; it tends to transmute this into truth vanquishing falsehood, meaning what power wins becomes considered true."<sup>173</sup>

The foregoing assumptions of ubiquitous male dominance, female helplessness, and the inefficacy of the First Amendment's preferred remedy of counterspeech—in other words, framing the issues in terms of an intergroup power struggle—underlie the MacKinnon–Dworkin project's advocacy of the generous deployment of state power largely along group lines. Because the perceived problem is one of power rather than communication or understanding, "only words" are not enough—force must be used.

Their proposed legislation would create administrative and judicial remedies, including civil damages and injunctive relief, in a broad range of cases.<sup>174</sup> Although described as creating a limited civil rights action for "four activities and four activities only—coercion, force, assault, and trafficking"<sup>175</sup>—those activities and pornography are so broadly defined that "[a]nyone injured by someone who has seen or read pornography has a right of action against the maker or seller."<sup>176</sup> Its definition of pornography is so sweeping as to equate *Playboy* magazine with snuff films.<sup>177</sup> Consistently with the MacKinnon–Dworkin view of female powerlessness, neither proof of actual knowing consent nor absence of physical force or threats are a defense to a coercion claim.<sup>178</sup> *Forcing* is itself undefined, but the authors would include within its purview actions such as the provision of pornography to medical students for educational purposes.<sup>179</sup> Neither knowledge nor intent by the defendant that the materials were pornographic need be shown except in the case of trafficking. *Trafficking*, defined as the "production, sale, exhibition, or distribution of pornography," generally excludes exhibition in a library, but conceivably could apply to a special display in a library.<sup>180</sup> And, in the case of trafficking, any woman may file a complaint "as a woman acting against the subordination of women."<sup>181</sup> Men, children, and transsexuals also may file such a complaint, but they "must prove injury in the same way that a woman is injured."<sup>182</sup>

Finally, the MacKinnon–Dworkin project's group orientation intersects with its concern with power in its heavy reliance on fear-arousing communication.<sup>183</sup> To that extent it resembles this country's more familiar examples of authoritarian movements—today's New Right movement and the earlier, much less sophisticated crusade of Joseph McCarthy. Of course, the facility with which advocates of a form of censorship can also invoke the specter of McCarthyism, as does the MacKinnon–Dworkin project,<sup>184</sup> suggests that the metaphor has its limits; but it nevertheless also has its utility. There are some revealing structural similarities between the Mac-

<sup>173</sup>ONLY WORDS, *supra* note 6, at 78.

<sup>174</sup>The proposed ordinance can conveniently be found in *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *summarily aff'd*, 475 U.S. 1001 (1986).

<sup>175</sup>FEMINISM UNMODIFIED, *supra* note 154, at 201.

<sup>176</sup>*American Booksellers*, 771 F.2d at 325.

<sup>177</sup>See ONLY WORDS, *supra* note 6, at 22–23 and 121–22 n. 32.

<sup>178</sup>*American Booksellers*, 771 F.2d at 325.

<sup>179</sup>*Id.* at 325–26.

<sup>180</sup>*Id.* at 325. This claim, however, is limited to more violent pornography.

<sup>181</sup>*Id.* at 326.

<sup>182</sup>*Id.*

<sup>183</sup>For a survey of studies in fear communication, see Howard Leventhal, *Findings and Theory in the Study of Fear Communications*, 5 ADVANCES EXPERIMENTAL PSYCHOL. 119 (1970).

<sup>184</sup>ONLY WORDS, *supra* note 6, at 77.

Kinnon–Dworkin project and the methods of the New Right and “Tail-Gunner Joe.” The authoritarian appeal of each lies in its ability to construct—through generalities, distortion, and innuendo—an immoral, threatening, out-group menace, against which the in-group can be rallied to project its members’ conflicts and to displace their aggression.<sup>185</sup>

For example, in his infamous Wheeling, West Virginia, speech, McCarthy warned that “the fate of the world rests with the clash between the atheism of Moscow and the Christian spirit throughout other parts of the world.” The Alger Hiss case showed the reality and immediacy of the threat; and if the rest of Congress lacked the moral courage to do something about it, at least McCarthy was prepared to carry on the good fight. McCarthy waved his trademark piece of paper (which he later said was an old laundry list) and declared, “I have here in my hand a list of 205 who were known to the secretary of state as being members of the Communist Party and who, nevertheless, are still working and shaping policy in the State Department.”<sup>186</sup> As part of his smear campaign against General George Marshall, McCarthy again provided a target for the fears and insecurities of many Americans during that uncertain period:

How can we account for our present situation unless we believe that men high in this government are concerting to deliver us to disaster? This must be the product of a great conspiracy . . . of infamy so black that, when it is finally exposed, its principles shall forever deserve the maledictions of all honest men.<sup>187</sup>

McCarthy showed how persons who questioned his methods could be lumped together in the out-group, simultaneously feared as part of the powerful menace and ridiculed for their intrinsic weakness:

Let me assure you that those who shed crocodile tears for the families of traitors whom I expose, with no tears left over for the families of American boys who were betrayed by those traitors, are scaring no one. Let me assure you that regardless of how high-pitched becomes the squealing and screaming of those left-wing, bleeding-heart, phony liberals, this battle is going to go on.<sup>188</sup>

McCarthy denounced as members of the conspiracy those who openly opposed him. For example, by introducing a resolution to impeach McCarthy, Connecticut’s Senator William Benton “established himself as the hero of every Communist and crook in and out of government.”<sup>189</sup>

More recently, a study of the New Right’s campaign to gain control of the public school curriculum collected numerous examples of these authoritarian methods. Mention of only a few conveys their flavor: Jesse Helms warned potential contributors to the National Conservative Political Action Committee that “your tax dollars are being used to pay for grade school courses that teach our children that cannibalism, wife swapping, and murder of infants and the elderly are acceptable behavior.”<sup>190</sup> And, according to Phyllis Schlafly, public schools teach “permissive

<sup>185</sup>For a brief description of McCarthy’s methods in this respect, see JACK ANDERSON & RONALD W. MAY, *MCCARTHY: THE MAN, THE SENATOR, THE “ISM”* 358–65 (1952).

<sup>186</sup>ROBERT GOLDSTON, *THE AMERICAN NIGHTMARE: SENATOR JOSEPH R. MCCARTHY AND THE POLITICS OF HATE* 71 (1973).

<sup>187</sup>*Id.* at 110.

<sup>188</sup>ANDERSON & MAY, *supra* note 185, at 206.

<sup>189</sup>*Id.* at 315–16.

<sup>190</sup>Forrest W. Parkay, *The Authoritarian Assault Upon the Public School Curriculum: An Additional “Indicator of Risk,”* 68 *HIGH SCH. J.* 120, 122 (1985) (quoting Senator Jesse Helms, fund-raising letter for



sexuality, anti-family lifestyles, and situation ethics rather than self-discipline and a moral code of behavior."<sup>191</sup>

Although much more refined, sincere, and intellectually respectable than McCarthy's crude, cynical, and often fantastic fumbling, the MacKinnon-Dworkin project also "makes everything easy to understand. In place of the whole complex political-economic-social-personal puzzle which seems to many people to have no solution, [the MacKinnon-Dworkin project] offers a simple rallying point, a single issue: anti-[pornography]."<sup>192</sup> McCarthy informed a Ramage, West Virginia, audience that "McCarthyism means Americanism that is ready to stand up and fight Communism."<sup>193</sup> The MacKinnon-Dworkin project has implied that it stands for feminism that is ready to stand up and fight pornography.<sup>194</sup>

The theme running through these examples is intergroup conflict wrapped in the moral mantle of crusade. McCarthy invoked the symbolic struggle between "patriotic Americans" and "communists." More recently, New Right demagogues and activists refer to a "cultural war" between "people of faith" and the morally and spiritually corrupt.<sup>195</sup> The MacKinnon-Dworkin mission is to liberate women from ubiquitous male oppression.<sup>196</sup>

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the National Political Action Committee (March 8, 1976)).

<sup>191</sup>*Id.* (quoting *The Phyllis Schlafly Report*, Jan. 1980, at p. 3).

<sup>192</sup>ANDERSON & MAY, *supra* note 185, at 359. See also Parkay, *supra* note 190, at 122-123 ("Another method of the New Right is to use single, vaguely worded issues such as morality or support of the family to unite otherwise dissimilar groups").

<sup>193</sup>ANDERSON & MAY, *supra* note 185, at 359-60.

<sup>194</sup>See *infra* notes 197-202, 217, and accompanying text.

<sup>195</sup>I am using the term *New Right* in exceedingly broad fashion to include diverse groups such as Christian Coalition activists, antiabortion extremists, and right-wing political hopefuls. I do recognize that there are differences in the content of those groups' beliefs and the means their members employ to achieve them. Nevertheless, the unifying theme of intergroup conflict appears valid for present purposes. Examples of this cultural war theme concerning each group follow:

1. Christian Coalition: Ralph Reed, the point man for the Christian Coalition, referred to his group as "people of faith," and predicted the demise of our civilization unless government acknowledged "the existence of that Supreme Being and [adopted] laws and public policy that re-enforce rather than undermine those values." G. Robert Hillman, *Ralph Reed: Interview*, DALLAS MORNING NEWS, Apr. 23, 1995, at 1J.

2. Antiabortion movement: Operation Rescue's Terry Randall, for example, has insisted that the "underpinnings of the republic have got to be what God gave Moses on Mount Sinai and confirmed through the Lord Jesus." For Terry the problem can be traced back to the Renaissance, which "sought to make man autonomous from God and from moral absolutes." Terry believes that contraception and abortion are tools of Satan, and that secular education is "some godless curriculum or setting, where [children's] minds are filled with pollution." To Terry the struggle is no less than a "cultural civil war." DONALD P. JUDGES, *HARD CHOICES, LOST VOICES: HOW THE ABORTION CONFLICT HAS DIVIDED AMERICA, DISTORTED CONSTITUTIONAL RIGHTS, AND DAMAGED THE COURTS* 13-14 (1993) (quoting Richard Lacayo, *Crusading Against the Pro-Choice Movement*, TIME, Oct. 21, 1991, at 26 (interviewing Randall)).

3. Right-wing political hopefuls: Notwithstanding the Republican sweep of Congress in the 1994 elections and the political ascendancy of Newt Gingrich, Patrick Buchanan's address to the 1992 Republican National Convention remains a powerful example of the political invocation of intergroup conflict. Buchanan, in some ways reminiscent of McCarthy himself, argued that "[t]here is a religious war going on for the soul of America. It is a cultural war, as critical to the kind of nation we will one day be—as was the cold war itself." Referring to armed intervention by troops to quell the Los Angeles riots of 1992, Buchanan went on to say, "as they took back the streets of Los Angeles block by block, so, we must take back our cities, and take back our culture, and take back our country." For a trenchant essay on the 1992 convention, see Norman Mailer, *By Heaven Inspired: Republican Convention Revisited*, THE NEW REPUBLIC, Oct. 12, 1992, at 22.

<sup>196</sup>In this respect, the MacKinnon-Dworkin crusade resembles elements of the Maoist justification

Menace-mongering pervades the MacKinnon–Dworkin project. First, they alleged that pornography inflicts violent injury: *Only Words* repeatedly describes the “carnage” caused by pornography, women “being beaten and tortured,” and children being “violated.”<sup>197</sup> Second, they argue that porn rots the fabric of society: *Only Words* depicts pornography as an insidious, creeping threat that is corrupting society.<sup>198</sup> Third, they contend that opposition to the MacKinnon–Dworkin project and defense of pornography subvert liberty: *Only Words* asserts that First Amendment protection of pornography is more like McCarthyism than is the censorship advocated by the MacKinnon–Dworkin project and objects to the “fundamentalist zeal” with which porn is defended, “even when it serves to protect lies, silence dissent, destroy careers, intrude on associations, and retard change.”<sup>199</sup> Under the MacKinnon–Dworkin analysis, “the liberal defense of pornography as human sexual liberation, as derepression—whether by feminists, lawyers, or neo-Freudians—is a defense not only of force and sexual terrorism, but of the subordination of women.”<sup>200</sup> Fourth, reversals suffered by members of the in-group’s inner circle exemplify how the “socially privileged or unscrupulous operatives of the status quo” conspire to persecute “individuals from subordinated groups who take on dominant interests in public,” such as “sexually libeled feminists who oppose pornography.”<sup>201</sup>

Finally, like the menace of Communism and its sinister sneaking hordes of fellow travelers or its latter-day equivalent in the malevolent forces of secular humanism, the evil influence of pornography and its despicable consumers is depicted as spreading everywhere, infecting our social, educational, legal, and political institutions:

Depending upon their chosen sphere of operation, [porn consumers] may use whatever power they have to keep the world a pornographic place so they can continue to get hard from everyday life. As pornography consumers, teachers may become epistemically incapable of seeing their women students as their potential equals and unconsciously teach about rape from the viewpoint of the accused. Doctors may molest anesthetized women, enjoy watching and inflicting pain during childbirth, and use pornography to teach sex education in medical school. Some consumers write on bathroom walls. Some undoubtedly write judicial opinions.

Some pornography consumers presumably serve on juries, sit on the Senate Judiciary Committee, answer police calls reporting domestic violence, edit media accounts of child sexual abuse, and produce mainstream films.<sup>202</sup>

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for authoritarian control, including “the idea of permanent revolution . . . [and] an unwillingness to emphasize the contradictory tension between individual freedom and strong central authority.” James A. Fetzer, *Mao Zedong: A Justification of Authoritarian Practice*, 68 THE HIGH SCH. J. 296, 296 (1985).

<sup>197</sup>ONLY WORDS, *supra* note 6, at 27, 37, 41.

<sup>198</sup>*Id.* at 25 (“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”).

<sup>199</sup>*Id.* at 77.

<sup>200</sup>FEMINISM UNMODIFIED, *supra* note 154, at 149.

<sup>201</sup>ONLY WORDS, *supra* note 6, at 81. The reference is to unsuccessful tort claims (e.g., intentional infliction of emotional distress, defamation, invasion of privacy) brought against *Hustler* magazine by advocates of the MacKinnon–Dworkin project for vulgar and offensive parodies of their beliefs, personalities, and persons. *Dworkin v. Hustler Magazine*, 867 F.2d 1188 (9th Cir. 1989); *Leidholdt v. L.F.P. Inc.*, 860 F.2d 890 (9th Cir. 1988). See also *supra* note 39 (describing Carlin Romano’s “rape” review of ONLY WORDS).

<sup>202</sup>ONLY WORDS, *supra* note 6, at 19.

These themes also emerge in the next subsection, which examines the MacKinnon-Dworkin project as an appeal to closed belief-disbelief systems.

#### *D. Closed Belief-Disbelief System*

The MacKinnon-Dworkin project resonates with closed rather than open belief-disbelief systems. Although it is rhetorically vivid, semantically complex, and full of references to "facts" and "data,"<sup>203</sup> its actual content is dogmatically and even self-consciously straightforward (albeit layered): (a) Society is thoroughly sexist. (b) Pornography is about nothing other than the illegitimately powerful, oppressive, and exploitative out-group (men) hurting—by, through, and for their own sexual pleasure and financial gain—the vulnerable, powerless, and ravaged in-group (women). (c) State intervention is therefore morally imperative. (d) The invocation of irrelevant First Amendment bromides to disable the state's power to protect the defenseless in-group from the rapacious out-group is egregiously immoral and contrary to the norms enshrined in the equal protection clause, and it smacks of complicity in the systematic subjugation of women, of which porn is an especially salient manifestation. (e) Because points (a) through (d) are so certain and self-evident as to be beyond serious dispute, the good faith of anyone who questions them is inherently suspect. The MacKinnon-Dworkin project's authoritarian appeal thus lies in its insistence that it has said all that is meaningful to say about sexuality, women's equality, and freedom of expression.

Challenges to the merits of its factual assertions and reasoning are met with several moves. One is to contend generally that the epistemological basis for any claims to objective reality in fact is a political exercise in male dominance.<sup>204</sup> In addition, although the project (quite selectively) cites some social science research, it also attacks scientific methodology itself as another instrument of male hegemony.<sup>205</sup> Meaning, knowing, understanding, and communication in this view are thus so contaminated by male domination as to make consideration of the merits of any challenges to the MacKinnon-Dworkin belief system problematic. The project thus comes full circle and reasserts its core belief that the issue is one of power between the in-group and the out-group; its persuasive force ultimately rests on the authoritativeness of that belief.<sup>206</sup>

These hermeneutical gambits become concrete with respect to the central premises of the MacKinnon-Dworkin position concerning key issues: women's powerlessness, the emotional and physical harm inflicted on women through the production and distribution of sexually graphic material, the nature of men's physical and psychic responses to pornography, and the causal relationship between those responses and women's subjugation generally and violent abuse particularly. In an open system, the factual underpinnings and conceptual coherence of those premises would be subject to critical, reasoned examination; and beliefs or disbeliefs would be subject to revision to integrate the outcome of that perscrutation. Because the real picture appears to be much more variegated than the one portrayed by the

<sup>203</sup>FEMINISM UNMODIFIED, *supra* note 154, at 51–52.

<sup>204</sup>*Id.* at 57–58.

<sup>205</sup>*Id.* For a review of other feminist writers who have challenged the purportedly neutral underpinnings of science and have asserted that "scientific theory is permeated by masculinist biases," see John Dupré, *Global Versus Local Perspectives on Sexual Difference*, in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE 47, 56–57 (Deborah L. Rhode ed., 1990) [hereinafter THEORETICAL PERSPECTIVES].

<sup>206</sup>See *supra* notes 151–66 and accompanying text.

MacKinnon–Dworkin project, however, that project presumably speaks more clearly to relatively authoritarian, closed-minded persons, whose tolerance for ambiguity is low but whose commitment to a group-oriented, “righteous” cause is strong.

First, the project’s general claim that the proliferation of pornography contributes substantially to the overall relegation of women to second-class citizenship is hardly free from doubt. To test such a claim, one might hypothesize that women’s social, political, and economic power should vary inversely with the volume of pornography produced and consumed. It seems unlikely that such a generalized negative correlation could be shown; and, in any event, the MacKinnon–Dworkin project has not demonstrated its existence. To be sure, sexual inequality remains a serious problem in late 20th century America; but establishing a causal relationship with pornography is an uncertain proposition. For one thing, granting the MacKinnon–Dworkin assumption that both technological and legal developments over the past several decades have facilitated an increase in the production and consumption of pornography (particularly pornographic videos), it is unclear what the broad social impact, if any, has been. But it is difficult to argue that women as a class have lost ground overall in their struggle for equality during that time.

To the contrary, by gross measures, women as a group have made striking progress in a number of significant areas. “[T]he single most important determinant of occupational status in United States society is years of schooling.”<sup>207</sup> Women’s educational participation and attainment have increased steadily; since at least 1980, for example, women’s college enrollment has exceeded men’s.<sup>208</sup> Substantial statistical inequality remains in the workforce, but women have made gains. The percentage of women holding a number of traditionally masculine jobs has increased.<sup>209</sup> Large imbalances obviously remain, and women continue to be overrepresented in lower status occupations (especially administrative support and service positions<sup>210</sup>), but some improvement, nevertheless, can be seen. Furthermore, although a substantial wage gap remains between men and women, it has narrowed overall and in most major occupational categories in recent decades.<sup>211</sup> Although elected and appointed offices remain overwhelmingly male-dominated, women have made progress in the political realm as well;<sup>212</sup> and the law has become increasingly responsive to some of the abuses women have endured as a class.<sup>213</sup>

<sup>207</sup>N. Brody, *The Validity of Tests of Intelligence*, in *HANDBOOK OF INTELLIGENCE* 353, 361 (B.B. Wolmen ed., 1985).

<sup>208</sup>BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES* tbls. 229, 231, 232 (1993).

<sup>209</sup>For example, the percentage of female lawyers and judges increased from 16% in 1983 to 21% in 1992. The percentage of executive, administrative, and managerial positions held by women increased from 32% to 42% during that time; the percentage of physicians who are women increased from 16% to 20%; the percentage of female police officers and detectives increased from 9% to 16%. *Id.* at tbl. 644.

<sup>210</sup>In addition to the data *id.* at tbl. 644, see tbl. 671, which does not even report wage and salary information for men in private household service occupations because the base is too small.

<sup>211</sup>Women’s median weekly wage in 1983 was 80% that of men’s. By 1992, it had increased to 86%. For each major occupational category, the following changes in the wage gap have occurred between 1983 and 1992: Managerial and professional, 69% to 72%; technical, sales, and administrative support, 64% to 70%; protective services, 70% to 80%; precision production, 66% to 67%; operators, fabricators, and laborers, 66% to 71%. *Id.* at tbl. 671.

<sup>212</sup>For example, female participation in both the House and Senate—although women remain grossly underrepresented—tripled between 1981 and 1993 (from 4% to 12% in the House; from 2% to 6% in the Senate).

<sup>213</sup>E.g., Civil Rights Act of 1964, §701 et. seq., 42 U.S.C. §2000(e)(1988); Civil Rights Act of 1991, 42

With respect to continuing discrimination and its effects, Nadine Strossen has observed:

By asserting that "pornography" is a central cause—or even *the* central cause—of sex discrimination, pro-censorship feminists deflect energy and attention away from the factors that feminist scholars and the U.S. Commission on Civil Rights have found to be the most significant causes of such 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.<sup>214</sup>

One might reasonably ask whether pornography's effects, even if not retrogressive, have nevertheless retarded women's progress so that they would have made even more gains in its absence. Of course, the lack of control conditions in this country makes the question speculative. It is worth noting, however, that women in several contemporary cultures in which pornography is strictly banned lag far behind their American sisters in the struggle for equality.<sup>215</sup> In any event, the question of pornography's general impact on women's equality hardly approaches the level of certainty portrayed by the MacKinnon-Dworkin project; and the structure of that belief system has no way to accommodate any such doubts.

A similar pattern emerges in the MacKinnon-Dworkin project's depiction of pornography's production and distribution. The scenario that they portray is graphic and unambiguous in its moral content; pornography is both an enduring reminder that, and a means by which, men take sexual pleasure (and financial profit) from hurting women:

Imagine that for hundreds of years your most formative traumas, your daily suffering and pain, the abuse you live through, the terror you live with, are unspeakable—not the basis of literature. You grow up with your father holding you down and covering your mouth so another man can make a horrible searing pain between your legs. When you are older, your husband ties you to the bed and drips hot wax on your nipples and brings in other men to watch and makes you smile through it. Your doctor will not give you drugs he has addicted you to unless you suck his penis.

You cannot tell anyone. When you try to speak of these things, you are told it did not happen, you imagined it, you wanted it, you enjoyed it. Books say this. No books say what happened to you. Law says this. No law imagines what happened to you, the way it happened. You live your whole life surrounded by this cultural echo of nothing where your screams and your words should be.

In this thousand years of silence, the camera is invented and pictures are made of you while these things are being done. You hear the camera clicking or whirring as you are being hurt, keeping time to the rhythm of your pain. You always know that the pictures are out there somewhere, sold or traded or shown around or just kept in a drawer. In them, what was done to you is immortal. He has them; someone, anyone, has seen you there, that way. This is unbearable.

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U.S.C. §1981 (1991); Title IX, 20 U.S.C.A. §1681 *et seq.* (1988); *Franklin v. Gwinnet County Public School*, 503 U.S. 60 (1992); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); Child Support Enforcement Act, 42 U.S.C.A. §659 (West, 1988); DOMESTIC VIOLENCE LEGISLATION: N.Y. CRIM. PRO. LAW §140.10(4)(c) (McKinney 1995); Glass Ceiling Act of 1991 (codified at 42 U.S.C. §2000e (Supp. III 1991)).

<sup>214</sup>Strossen, *supra* note 15, at 1155.

<sup>215</sup>*Id.* at 1184.

What he felt as he watched you as he used you is always being done again and lived again and felt again through the pictures—your violation is his arousal, your torture his pleasure. Watching you was how he got off doing it; with the pictures he can watch you and get off any time.<sup>216</sup>

The MacKinnon–Dworkin project thus asserts that women are coerced into making pornography and are physically and emotionally abused in making it, in a fashion that is the functional equivalent of the sexual abuse of children.<sup>217</sup>

The blunt affective appeal of that portrait is unmistakable: It is intended to horrify and to outrage. The cognitive message is also simple: Pornography must go. In the face of such gripping imagery, abstract arguments about First Amendment values seem callous, trite, and pallid. Thus, the net effect of the MacKinnon–Dworkin project's portrayal of pornography is to reduce any debate on the subject to a largely rhetorical question: How can such a thing possibly be defended?

Once again, the appeal to closed-mindedness lies not so much in the conclusion as in the premises. What is missing is meaningful consideration of any perspective that might be inconsistent with the project's stark conclusion. The MacKinnon–Dworkin project implicitly denies by omission the legitimacy of any inquiry into the accuracy of the picture it paints. To substantiate the claim that the foregoing passage captures the essence of pornography, MacKinnon asserted, "Women used in pornography have provided the basis for the statements in these paragraphs over many years of work by me and my colleagues."<sup>218</sup>

When one takes a periscopic approach, however, a more complex panorama reveals itself. The MacKinnon–Dworkin project does not relate all of the stories worth hearing from the women, or the men, who participate in the production of pornography. A far different impression is created, for example, by the self-described ethnographic work of the late psychoanalyst Robert Stoller, whose agenda appears to be more descriptive than prescriptive. He has talked at length with a small but important sample of the participants in the pornography industry—leading performers and producers, women and men. Unlike *Only Words*, Stoller's work largely lets the participants speak for themselves ("In my game one is obliged to use what real people really said"), and his conclusion is the quintessence of open-endedness: "The more people I talk with, the more I know I need to know more. Though certain features then appear in the fog, I get an increasing sense of the complexity of the subculture."<sup>219</sup> Stoller's interviews—which, also unlike the MacKinnon–Dworkin project, make no pretense of exhaustiveness—offer an alternative description of the pornography industry. Although hardly flattering, that description affords a glimpse of the issues' complexities.

Consider, for example, the assertion that women are coerced into participating in pornography. Of course, one strategy for closing the belief system with respect to that issue is to define coercion so broadly that the hypothesis becomes self-proving. When general group disadvantage equates with coercion, the term loses most of its information value and the issue moves from cognitive evaluation to ideological

<sup>216</sup>ONLY WORDS, *supra* note 6, at 3–4 (notes omitted).

<sup>217</sup>See *supra* text accompanying notes 151–56.

<sup>218</sup>ONLY WORDS, *supra* note 6, at 113 n.2. As a source of her description of pornography, MacKinnon cited LINDA MARCHIANO & MICHAEL MCGRADY, ORDEAL (1980) (Linda "Lovelace's" story of being abused and forced by her former husband to make the film "Deep Throat").

<sup>219</sup>ROBERT J. STOLLER, MD, PORN: MYTHS FOR THE TWENTIETH CENTURY 23 (1991).

faith.<sup>220</sup> As Stoller noted, however, “we also need to listen to such women so we can better see how they were coerced by others, how by themselves, and how not at all—consciously, subliminally, and unconsciously.”<sup>221</sup> One of Stoller’s interviewees, Porsche Lynn (a sophisticated pornography star), tells a story that fits the stereotypic family background of sexual abuse and other trauma, delinquency, and drug and alcohol abuse.<sup>222</sup> It also illustrates that there might be more to understand about her participation in the pornography industry than the MacKinnon–Dworkin project’s all-encompassing coercion claim.<sup>223</sup>

Despite the disadvantages that she faced, Lynn graduated high school at the top of her class, won a full scholarship to college, and had earned enough money from “straight” jobs to finance a car and an apartment on her own. With the advent of the Reagan administration, however, she lost all of her scholarships and found herself in need of work. She turned to topless dancing, mud wrestling, and nude as well as conventional modeling: “I was making more money and more money, and I started to like making money.”<sup>224</sup> She dropped out of college and began performing in peek booths and pornographic movies.

She has criticisms of the industry, but none are as grisly as the staples of the MacKinnon–Dworkin campaign. The exploitation that she described is more subtle and much more prosaic, and it utterly fails to warrant the kind of authoritarian governmental intervention advocated by MacKinnon and Dworkin. One of her biggest complaints is that young women at 18 (who are much sought after by producers) lack the judgment to appreciate what they are getting into; her description sounds more like a seduction than a rape: “Younger girls get sucked in because of all the glamour around the Industry—the limousines, the clothes, the fancy places, and money.”<sup>225</sup> To Lynn, then, exploitation occurs because these young

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<sup>220</sup>Consider, for example, the following somewhat baffling passage:

Not all pornography models are, to our knowledge, coerced so expressly [by physical violence], but the fact that some are not does not mean that those who are, aren’t. It only means that coercion into pornography cannot be said to be biologically female. The further fact that prostitution and modeling are structurally women’s best economic options should give pause to those who would consider women’s presence there a true act of free choice.

FEMINISM UNMODIFIED, *supra* note 154, at 180. Apart from its bewildering concatenation of alleged facts and dangling conclusions, the passage’s conception of freedom is obscure. For the proposition that no participant in a free-market system is truly free, see C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 787 (1986) (“the possessive market operates in a particularly coercive manner to determine what choices are made in the worlds of production and commerce” because “[t]he competitive market forces each entrepreneur to strive for more”).

<sup>221</sup>ROBERT J. STOLLER, MD & IRA S. LEVINE, *COMING ATTRACTIONS: THE MAKING OF AN X-RATED VIDEO* 201 (1993).

<sup>222</sup>Another such story is told by “Happy Day” (who was beaten and sexually abused as a child) in her interview as she was just starting out as a pornography performer. STOLLER, *supra* note 219, at 75–79.

<sup>223</sup>When she was 6, Lynn’s father murdered her mother and then committed suicide. She was shuffled from one home to another before being adopted by her aunt, whose husband sexually molested her and finally threw her out of the house.

<sup>224</sup>STOLLER, *supra* note 219, at 204.

<sup>225</sup>It looks so glamorous. They get contracts with companies and contracts mean getting picked up in limousines, being driven to the set; they take care of your air fare, they take care of your hotel, they take care of everything for you. You get to the set, they take care of your hair, they do your nails, they do your makeup, have someone there telling you what your lines are, they have someone to dress you. At eighteen that makes the sexual thing easier. Their body is saying, “Yeah, let’s do it,” and then how glamorous all this other stuff that’s being done for them seems. . . . So it’s easy for

performers are “not making their own business deals.”<sup>226</sup> She also explained that another aspect of

why females, especially young girls, start making adult movies is for the attention, the adoration of lots of people. A lot of these girls come from dysfunctional families, including myself. . . . Through the X-rated movie business, I’ve gotten adoration and love (translated through lust) from hundreds of people, men and women.<sup>227</sup>

Another successful performer, Monica “Nina” Hartley, also contradicts the gory images offered by the MacKinnon–Dworkin project. Although she is a registered nurse, she does not practice nursing because “I’d work three or four times as many hours for half the money. I find [making porn] . . . much less stressful than being a professional nurse.”<sup>228</sup> Describing herself as a feminist and middle class, she asserted that “[t]he horror stories are pretty much unfounded. I haven’t heard any horror stories about women getting into the business by force.”<sup>229</sup>

Unlike MacKinnon and Dworkin, this obviously intelligent and aware woman—who has direct personal experience with which to inform her views—sees several sides to the issues and is “conflicted” about their complexity: “When Dworkin said all women are brainwashed, I know what she means. . . . And I get angry at the [porn] business for blatantly taking advantage of someone young and stupid who wants to try something new. On the other hand, no one is drafting them.”<sup>230</sup> But “I talk mainly to white middle-class feminists, who don’t understand exhibitionism. They do not understand that some women with options like doing this. I don’t have to do this.”<sup>231</sup> After 7 years’ experience, she concluded that although “sex films are defensible, the feminists [rightly] want the motherfuckers out: I’m tired of these guys hiring women who have no business being there and not caring about the performers as people. . . .

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them, easy to get sucked in, easy for them to handle a situation they’re not handling. People are handling it for them. That’s the only exploitation; these young girls are eighteen, and the company does everything for them without making sure they understand that porn will affect the rest of their lives. It will never be the same as it was before porn. I don’t necessarily mean that in a negative way. It will just never be the same.

*Id.* at 210.

<sup>226</sup>*Id.* Otherwise, she explained, “I’ve never believed that this [porn] was actual exploitation, because the financial thing is there. We’re doing this for financial gain. I exploit the male and female sex drive to gain financial success.” She did note, however, that her decision to enter the porn industry was probably much more clearly volitional than that of others: “There are a lot of people who have just fallen into it [porn] because it’s easy for them; they have nothing better to do; they need to support a drug habit; or whatever. But with me it was something that I really looked at for a long time and made a good solid decision.” *Id.*

<sup>227</sup>*Id.* at 215. A pornography producer concurred:

They have to give their flesh, and they may indeed have to sell their soul; what they do is get a nurturing of their reason for existence. The X-rated Industry, like no other place in the world, gives you a reason to exist. It gives you instant reaffirmation of your own self-worth. Maybe you’re giving up a few tangential social mores in the process, but these people need to see a reason for their existence; they need to be validated.

*Id.* at 80.

<sup>228</sup>Hartley graduated from college magna cum laude with a degree in nursing. *Id.* at 138–39.

<sup>229</sup>*Id.* at 147.

<sup>230</sup>STOLLER & LEVINE, *supra* note 221, at 166.

<sup>231</sup>*Id.* at 167.



But I'll debate with certain women on whether it's okay or not to show a penis and a vagina in contact."<sup>232</sup>

Another example is the MacKinnon–Dworkin project's allegation that physical and psychological violence is commonplace in the production of pornography. Other sources, including at least some performers, disagree. For example, Candide Royalle, porn performer and producer, "reported that after years of performing in sexual material without incident, she was sexually assaulted in her first job as a secretary."<sup>233</sup> None of Stoller's interviewees described the kind of abuses alleged by the MacKinnon–Dworkin project.

The MacKinnon–Dworkin project's insistence on its two-dimensional version of reality illustrates that closed belief–disbelief systems operate at significant cost. Emphasis on power- and group-related aspects and the tendency toward exaggeration and polarization can impoverish consideration of the merits of an issue.<sup>234</sup> A more open-minded approach might identify serious problems and the need for substantial reforms within the industry. One who is intent simply on demonizing an out-group would be disinclined to recognize those problems, however, because they would be inconsistent with the black-or-white belief that the industry is nothing more than the embodiment of the out-group's innate corruption and the disbelief in the complexities and ambiguities of the actual people involved and their experiences. To an authoritarian's closed belief system, therefore, the most salient aspects of an issue are those related to intergroup conflict and power. Real-life, nitty-gritty problems—which might actually be more relevant to in-group (as well as out-group) members' immediate welfare—tend to become invisible to the extent that they conflict with the belief–disbelief system and in-group solidarity.

In other words, closed belief systems are fruitful sources of external critique; but such systems have difficulty engaging in constructive internal critique. One performer–producer, who apparently has few illusions about the industry, put it this way:

The social cost of X-rated entertainment is probably sustainable, but the personal toll it exacts from its creators can be steep. In my utopian dream, society accepts the need for erotic entertainment, gives up on trying to eliminate it, and mandates workplace reforms for the protection of those who provide it.<sup>235</sup>

Unlike the MacKinnon–Dworkin project, the Stoller interviews do not wave the bloody blouse; but they do describe a harsh and risky industry badly in need of

<sup>232</sup>*Id.* at 168.

<sup>233</sup>MARCIA PALLY, *SEX & SENSIBILITY: REFLECTIONS ON FORBIDDEN MIRRORS AND THE WILL TO CENSOR* 78 (1994).

<sup>234</sup>More generally, and consistently with the theory of closed-mindedness, it has been found that persons high in dogmatism are more likely (with opportunity for reflection) to increase the polarization of their attitudes, to adhere more firmly to their beliefs, and to reject attitude-inconsistent beliefs. Christopher Leone, *Self-Generated Attitude Change: Some Effects of Thought and Dogmatism on Attitude Polarization*, 10 *PERSONALITY & INDIVIDUAL DIFFERENCES* 1243 (1989). Furthermore,

[b]ecause they do not spontaneously use reality constraints, dogmatic individuals will not only polarize their attitudes toward [a member of an out-group with whom they have had an unpleasant experience] but also allow their feelings to generalize in an unconstrained fashion toward other members of that group.

Christopher Leone et al., *Self-Generated Attitude Change: Some Effects of Thought, Dogmatism, and Reality Constraints*, 12 *PERSONALITY & INDIVIDUAL DIFFERENCES* 233, 239 (1991).

<sup>235</sup>STOLLER & LEVINE, *supra* note 221, at 235.

change. One particularly grave problem, for example, is the risk of HIV infection. Several interviewees commented on the industry's resistance to "safe sex" practices—many producers' indifference to performers' welfare and the performers' own ambivalence, fatalism, recklessness, and fears.<sup>236</sup> In the relatively small, close-knit community of pornography performers, infection would spread like wildfire. Several performers advocated mandatory testing and one commented that more producers are requiring a recent negative test.<sup>237</sup> Several also warned of an increasing prevalence of high-risk practices; for example, one porn script writer (Ron) complained that "there is now more emphasis on anal penetration than ever in the history of the medium."<sup>238</sup>

Ron's comments about consent and personal choice in this connection also contrast with the MacKinnon–Dworkin project's position that all women are coerced. Although opposed to censorship, he recognized that porn producers "don't care what damage it does to the people [they] hire"; he therefore advocated increasing performer awareness and solidarity so that they can collectively set safety standards.<sup>239</sup> Again unlike MacKinnon and Dworkin, from his insider's perspective he saw several sides to the consent question. He argued that the "senior performers in the Industry," who are more sophisticated and have more clout, should assume a leadership role with respect to safe sex. Yet he also recognized that performers are being misinformed about the risks and that "[s]ome people have encouraged their rationalizations in an exploitative way."<sup>240</sup> Another producer stated that many sex performers "despise what they're doing for a living. Absolutely despise it. . . . I think they feel they're trapped."<sup>241</sup> Furthermore, one might target the likelihood of judgmental immaturity in 18-year-olds as a problem and recommend legal intervention to establish a higher age of consent in decisions of such powerful and enduring consequences.

The economics of the industry also work against the performers. Although the performers make far more money than most people their age could hope to earn in more conventional work, several interviewees described them as exploited workers. Ron's comments, for example, are worth quoting at length. They further highlight how the MacKinnon–Dworkin project's relatively closed-minded approach misses important contours of the problem that are apparent to an informed, skeptical observer and how its proposed remedy thus fails to address less sensational but perhaps more realistic and tangible harms:

There is something they [MacKinnon–Dworkin feminists] are very wrong about, but there's something they're right about. They are wrong about the content of the

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<sup>236</sup>*E.g., id.* at 56, 175, 213, 216.

<sup>237</sup>*Id.*

<sup>238</sup> STOLLER, *supra* note 219, at 206.

<sup>239</sup>*Id.* at 205.

<sup>240</sup>*Id.* at 206. For example, Ron described Betty, a female performer who had been able to work long past the usual retirement age dictated by the demand for young women because of her willingness to engage in the high-risk behavior of multiple anal penetrations. When Ron confronted her about her risk-taking, Betty rationalized that "I take very good care of myself. I think my immune system is in good shape. I just don't think I'm very likely to get anything." *Id.* at 205. But Ron also commented that Betty is "a thirty-seven-year-old consenting adult who has been around plenty in this world and who reads." *Id.* He agreed that she was informed, not the victim of any coercion, and had in essence victimized herself through denial.

<sup>241</sup>*Id.* at 39–40.

material, which for the most part, pictures a gentle and idealized human sexuality that is surprisingly mutual and democratic. Indeed, if the way sex is portrayed in pornography were the way it existed in society, society would be more to the liking of many feminists. It would be a kinder society if people's lives were as carefree, hassle free, mutual, and pleasurable as they are depicted in porno. A rather utopian world.

But where the feminists are dead right is their perception that female porn performers represent a class of oppressed female workers. Male performers represent a class of oppressed male workers. Workers in the sex industry overall are underpaid for the work they do and the risks they take. They enjoy few protections or benefits and no long-term security. It's a hard life, though one chosen as freely as any other hard life. . . .

You'd have to go a long way to find an industry with worse labor practices. They work people very hard; they pay them very little, really, for what they do. The profit-to-investment ratio is incredible for the people making these things. They spend nothing, they make a fortune. . . . As a porno performer, you're putting up with a couple of days of hard, even abusive behavior that compromises your ability to do anything else in your life ever again, because the piece of evidence of your past misbehavior continues to exist. You're doing this for six, seven, eight hundred bucks a day. It seems like big money. Yet when you realize what the stakes are, it's very small money. That other people who have insulated themselves from these risks are making tremendous profits from your hardships creates a nasty atmosphere.<sup>242</sup>

The foregoing problems are among the reasons that some Stoller interviewees advocated a greater voice for workers in the industry. And several specifically urged more control for women, suggesting that increasing women's participation in the production and business end of the industry would improve not only working conditions but also the quality of the product. For example, Lynn reported being blacklisted (which she described as the most coercive practice in the industry) after organizing the Pink Ladies, an association to inform and to protect women in the industry.<sup>243</sup> That kind of street-level empowerment, while potentially more relevant and helpful to the real women involved in the production of pornography, is inconsistent with and outside the view of the MacKinnon-Dworkin project's insistence on a paradigm of female victimhood.

Closed-mindedness can be especially problematic for a movement devoted to a goal that is as plexiform as sexual equality. For example, the MacKinnon-Dworkin project's insistence on the women-are-victims model has been criticized as reinforcing the kind of stereotype that other feminists have worked to overcome.<sup>244</sup> *Only Words* explicitly equates women's unequal position with respect to pornography to

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<sup>242</sup>*Id.* at 205-06.

<sup>243</sup>The producers were afraid we'd create a union and tell girls what not to do. Like anal sex without condoms. The producers want those girls to be uneducated. They knew that with this organization, there'd be a lot more well-educated women in the Industry. I think they were just afraid of that. STOLLER & LEVINE, *supra* note 221, at 212. A federal court in Texas recently ruled that topless dancers are covered by federal wage and hour laws and therefore are entitled to guaranteed minimum wage. Daily Lab. Rep. (BNA) 72 (Apr. 14, 1995). In California, topless dancers have organized a labor union to fight what they believe are unfair labor practices. National Public Radio, *All Things Considered*, Transcript # 1722-7 (Jan. 9, 1995).

<sup>244</sup>See, e.g., Strossen, *supra* note 15, at 1147-53; Drucilla Cornell, *Book Review: Sexual Difference, The Feminine, and Equivalency: A Critique of MacKinnon's Toward a Feminist Theory of the State*, 100 YALE L.J. 2247 (1991).

that of children.<sup>245</sup> Former National Organization for Women president Karen De Crow objected that “[w]hat we had in mind 25 years ago was not a new puritanism, but freeing women from being eternal children. As grown-ups we have won the right to say no, and be believed and taken seriously. We also have the right to repeat, after Molly Bloom, ‘Yes I said yes I will yes.’”<sup>246</sup>

More generally, peremptory definition of feminism’s premises and agenda—and consequently, in view of the role of belief similarity in prejudice formation, definition of the in-group feminist as well—may contribute to a level of intolerance and divisiveness that is especially damaging to the feminist cause. As Herma Hill Kay has observed, “feminists can ill afford to adopt a corrective strategy of silencing other female voices. An imposed unity of correct views can never be an appropriate goal for a movement devoted above all to the awakening of female consciousness.”<sup>247</sup>

Of course, neither women collectively nor feminists of either sex understand sexual equality in monolithic terms. For example, some more “moderate” forms of feminist theory “neither reject male thought entirely nor seek to reverse totally the patriarchal valuing of men’s thinking over women’s.”<sup>248</sup> To more radical feminists, however, the moderates’ viewpoint is a betrayal; it “constitutes a form of denial, bad faith, and ultimately, collaboration with patriarchy.”<sup>249</sup> According to MacKinnon, for whom *my view* and *feminism* are explicitly synonymous,<sup>250</sup> other feminist perspectives are guilty of “reifying” the damage of sexual domination into a theory of difference, which “is an insult to our possibilities” and contributes to the silencing of women’s voices.<sup>251</sup>

More particularly, feminist perspectives on pornography are not uniform. For example, “many prominent feminist scholars, activists, and artists object to censoring pornography on feminist grounds.”<sup>252</sup> To MacKinnon, however, such so-called feminists’ ideological treason places them in the most reviled out-group, along with pimps and pornographers. She therefore has refused to engage publicly in a dialogue with such women: “I do not allow myself to be used to orchestrate and legitimate a so-called ‘debate within feminism’ over whether pornography harms women. It is my

<sup>245</sup>ONLY WORDS, *supra* note 6, at 36.

<sup>246</sup>PALLY, *supra* note 233, at 150.

<sup>247</sup>Herma Hill Kay, *Perspectives on Sociobiology, Feminism, and the Law*, in THEORETICAL PERSPECTIVES, *supra* note 205, at 74, 85. See also Regenia Gagnier, *Feminist Postmodernism: The End of Feminism or the Ends of Theory?*, in THEORETICAL PERSPECTIVES, *supra* note 205, at 21, 21–22. (“Feminist theory has long proved itself equal to the battle of difference between men and women. Its task today is to take into account differences among women”).

<sup>248</sup>Susan Moller Okin, *Thinking Like a Woman*, in THEORETICAL PERSPECTIVES, *supra* note 205, at 145, 154. For an overview of this version of feminism, see Donald P. Judges, *Taking Care Seriously: Relational Feminism, Sexual Difference, and Abortion*, 73 N.C.L. REV. 1323, 1329–44 (1995).

<sup>249</sup>Robin L. West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 43 (1988) (describing radical feminist view).

<sup>250</sup>For example, she has described her position on pornography as “the feminist view.” Catharine A. MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL’Y REV. 321, 326 (1984) (emphasis added).

<sup>251</sup>FEMINISM UNMODIFIED, *supra* note 154, at 39, 49.

<sup>252</sup>Strossen, *supra* note 15, at 1109. The examples cited by Strossen, who is current president of the American Civil Liberties Union, include The Feminist Anti-Censorship Taskforce; Feminists for Free Expression; the National Coalition Against Censorship’s Working Group on Women, Censorship, and Pornography; and the substantial feminist opposition (including that by the two biggest chapters of the National Organization for Women) to the proposed Pornography Victims’ Compensation Act, S. 1521, 102d Cong., 1st Sess. (1991). See generally WOMEN AGAINST CENSORSHIP (Varda Burstyn ed., 1985).

analysis that that is the pimps' current strategy for legitimizing a slave trade in women."<sup>253</sup> And that, presumably, is that.

A closed system's resistance to belief-discrepant information and its tendency to process information in terms of group power relations combine in the MacKinnon-Dworkin project's stereotypic rendering of adult male performers' experience in the production of pornography: "Is the man's erection on screen 'simulated' too? Is he 'acting' too?"<sup>254</sup> That project's conception of women pornography performers as the edentate victims of the ubiquitously predatory male might be threatened by information suggesting any disadvantages from the men's perspective.

Many of Stoller's interviewees commented that women performers typically are better paid and better treated than the men, even though there are many more women than men performers.<sup>255</sup> Several commented on the psychological and physical strains on the men, that only a few of the many would-be performers can take it, and that many male performers "come from the same abused, molested, incest-ridden backgrounds as men and women in the sex business everywhere."<sup>256</sup> Ron's observations suggest that the MacKinnon-Dworkin stereotype-reinforcing version may be incomplete:

Though the female performers elicit sympathy for their situation, the male performers' circumstances are probably more trying. They probably need the sympathy more and get it less. Someone always wants to help, save, support, and otherwise come to the aid of damsels in distress in this business. But the distress of the men is private and does not inspire much sympathy. In fact, I think it inspires resentment from other men. Other men look at these pictures and say, "Those lucky sons of bitches. . . ." But when I watch them work, the impression is not of men having a good time. It is the impression of men doing a grim piece of work.<sup>257</sup>

And several of the interviewees explained that the erections of the male performers, which figure so prominently in the MacKinnon-Dworkin imagery, result more from self-control, concentration, and self-effort than the kind of robotic response to the

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<sup>253</sup>David Margolik, *Catering to an Academic Superstar, Judges Find Themselves Tangled in Free-Speech Debate*, N.Y. TIMES, Nov. 5, 1993, at B12, col. 5. Reporters who have attempted to interview MacKinnon have reported that she insisted on vetting everything that they may have previously written about, for example, free speech, women, and Andrea Dworkin. *E.g.*, Lesley White, *A Porn Fighter*, SUNDAY TIMES, June 12, 1994 (London); Catherine Bennett, *Portrait: A Prophet and Porn*, THE GUARDIAN, May 27, 1994, at T20 (London).

<sup>254</sup>ONLY WORDS, *supra* note 6, at 27.

<sup>255</sup>*E.g.*, STOLLER, *supra* note 219, at 42; STOLLER & LEVINE, *supra* note 221, at 171-72.

<sup>256</sup>STOLLER & LEVINE, *supra* note 221, at 55. Co-author Ira Levine, porn performer and producer, went on to muse about the psychological profile of porn performers of both sexes and his own background:

[Not only are they immature, b]ut they also have something else, an angry thing that comes out toward themselves and others. . . . Why does it exist? Because people find a way to integrate these disastrous, traumatic experiences into their lives. Having an hysterical, destructive mom, with whom you slept until the age of ten, with whom you'd lie in bed for three hours every morning after your father had departed for work, with whom you were either arguing savagely or making up with great emotion or tenderness. These things put a mark on a person, to put it mildly, that time does not erase. I suppose these are the epiphanies that came with my mother's death.

I mean, what really did go on between my mother and me? Probably not a lot of physical contact. She wasn't very physical. The phone sex thing: almost to the end of her life. We had a regular phone sex date, where we would talk about our sexual adventures. I would masturbate while we did this.

*Id.* at 56-57.

<sup>257</sup>STOLLER, *supra* note 219, at 158.

eroticization of women complained of by the MacKinnon–Dworkin project. Indeed, for at least some of the men, the women performers (many of whom “seem not at all interested” in assisting the men’s performance) often have little to do with it; the men’s response is to stimulation that is more cognitive and haptic than visual.<sup>258</sup>

This admittedly anecdotal look at the male performer’s experience (which is apparently no less reliable than the MacKinnon–Dworkin project’s evidentiary basis) reveals a curious aspect of the relationship between the MacKinnon–Dworkin project’s closed-belief structure and its appeal to authoritarianism. *Only Words* aphoristically summarizes its opposition to pornography: “It is what it takes to make it and what happens through its use that are the problem.”<sup>259</sup> In addition to the oft-repeated but probably exaggerated allegations of violence, *Only Words* offers other (perhaps more realistic) examples of the problem of what it takes to make it: For the women involved in its production, “[n]o pornography is ‘real’ sex in the sense of shared intimacy. . . .”<sup>260</sup> Instead, “[t]o look real to an observing camera, the sex acts have to be twisted open, stopped and restarted, positioned and repositioned, the come shot often executed by another actor entirely. The women regularly take drugs to get through it.”<sup>261</sup> The problem with “what happens through its use,” MacKinnon asserts, is that it makes male consumers “want to live out the pornography further in three dimensions.”<sup>262</sup>

The beliefs underlying the MacKinnon–Dworkin assertion that what happens to women in pornography’s production mirrors what happens to them in its consumption, however, are threatened by the information concerning male performer’s experience related above. Participation in pornography apparently does not have the effect on men that the MacKinnon–Dworkin project ascribes to its consumption. If the Stoller interviews have any factual validity, they suggest (a) that participation in pornography’s production may actually desensitize the men to women as sexual stimuli and (b) that the male sexual response is a much more complex psychophysiological phenomenon than is portrayed by the MacKinnon–Dworkin project. Therefore, if pornography’s production recapitulates its social effect, as that project itself claims, the question arises whether the proliferation of pornography might similarly have an effect on its consumers opposite to that feared by the MacKinnon–Dworkin project. In other words, if repeated participation in pornography diminishes the importance of the actual women’s sexual display to the arousal of the male performers, renders the men’s process more internally driven, and in effect increases the sexual distance between the men and the women, and if porn does as porn is, then the keystone empirical claim of the MacKinnon–Dworkin project—that “[s]ooner or later, in one way or another, the consumers want to live out the pornography further in three dimensions”—is called into question. Research into these issues, discussed below, has yielded mixed results, showing decrease in arousal

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<sup>258</sup>*Id.* at 157: “It seems like a meditated process: they go off by themselves for awhile before they do their scene; they rest; I suspect they [fantasize]; they masturbate, they come onto the set masturbating, they’re getting themselves worked up.”

<sup>259</sup>ONLY WORDS, *supra* note 6, at 15.

<sup>260</sup>*Id.* at 27.

<sup>261</sup>*Id.*

<sup>262</sup> *Id.* at 15, 19.

but increase in negative attitudes toward women from prolonged exposure to pornography.<sup>263</sup>

The MacKinnon–Dworkin project’s resistance to information that might require such reconsideration of the belief–disbelief system that it offers not only typifies the closed-system process, it also reflects authoritarianism’s conflicted relationship with sexuality. In the next section I consider the MacKinnon–Dworkin project in light of research into that relationship.

### *E. Sexuality*

The Berkeley Study offered a psychodynamic account of the whys and whats of authoritarianism; Rokeach’s studies of open- versus closed-mindedness conceptualized the hows in cognitive terms. According to the Berkeley group, authoritarianism consists in significant part of defense (through repression, projection, splitting, and displaced aggression) against the perceived threat of sexuality:

The present variable is conceived of as ego-alien sexuality. A strong inclination to punish violators of [the ingroup’s] sex mores . . . may be an expression of a general punitive attitude based on identification with ingroup authorities, but it also suggests that the subject’s own sexual desires are suppressed and in danger of getting out of hand.<sup>264</sup>

Rokeach’s model explains how a closed-minded system, operating from a core belief such as “sex is dangerous,” processes information and deploys strategies consistently with that belief—for example, by denying or avoiding ambiguity-creating information. When viewed in light of those two models, the MacKinnon–Dworkin project fits the authoritarian pattern of “exaggerated concern with sexual matters, a desire to censor sexual material, and a tendency to punish those who violate sexual norms.”<sup>265</sup>

The MacKinnon–Dworkin project has strong authoritarian appeal. One who feels threatened by sexuality can find in it considerable moral justification for repression and aggression in the form of censorship of sexually graphic material. And the project’s structure offers a closed-belief–disbelief system with which to shield that justification from complex, ambiguous, and potentially discrepant information.

First, the MacKinnon–Dworkin project reinforces the authoritarian position that sexual impulses are dangerous and must be strictly regulated; and it encourages authoritarian projection of those feelings onto stereotyped images of male and female sexuality. The theme underlying this appeal is that sex itself is horrific and violent:<sup>266</sup> For men, sex unleashes the brutal, mindless, ravaging urges that define their gender and implicate each of them in every crime ever perpetrated against women.<sup>267</sup> For women, it creates their chronic victim status by coercively inflicting on

<sup>263</sup>See *infra* note 308 and accompanying text.

<sup>264</sup>ADORNO ET AL., *supra* note 51, at 170.

<sup>265</sup>*Husband–Wife Similarity*, *supra* note 5, at 386.

<sup>266</sup>See, e.g., FEMINISM UNMODIFIED, *supra* note 154, at 130 (framing the important question as “whether sexuality itself is violating or even whether it is itself violent”).

<sup>267</sup>Force—the violence of the male confirming his masculinity—is seen as the essential purpose of the penis, its animating principle as it were, just as sperm ideally impregnates the woman either without reference to or against her will. The penis must embody the violence of the male in order for him to be male. *Violence is male; the male is the penis; violence is the penis or the sperm ejaculated from it.* What the penis can do it must do forcibly for a man to be a man. The reduction of human erotic potential to “sex,” as defined by the force of the penis visited on an unwilling woman, is the governing sexual scenario in a male-supremacist society.

them traumatic physical injury and a form of existential murder in which they are forced to become accomplices after the fact.<sup>268</sup> In this way, men and women, in their respective gender roles of perpetrator and victim, are portrayed as defined and overcome by sex's destructive power.<sup>269</sup>

The MacKinnon–Dworkin project identifies the perfect target for the projection of these fears: Pornography, *Only Words* asserts, “is sex.”<sup>270</sup> Every scary, nasty, and evil thing that sex can be, therefore, is pornography. The sex in pornography's production consists of men coercing real women into allowing themselves to be degraded, maimed, and killed. The sex in pornography's consumption means that those outrages become part of the sex act and catalyze men's urge to commit them against other, off-stage women.<sup>271</sup>

The MacKinnon–Dworkin project's cantilevered conclusion—that the only safe protection from this menace is repression (in the form of censorship)—closely tracks the authoritarian pattern. When *Only Words* asserts that “having sex is antithetical to thinking,” it resembles the authoritarian fear that the ego will be unable to cope with overwhelming id impulses.<sup>272</sup> It ties that fear to offensively negative out-group stereotype by proclaiming that “a stiff prick turns the mind to shit.”<sup>273</sup> And it splits sexuality into the complementary roles of evil, repugnant perpetrator and pure, innocent victim: “Pornography thus offers both types of generic sex: for those who want to wallow in filth without getting their hands dirty and for those who want to violate the pure and get only their hands wet.”<sup>274</sup>

That structure supports the suspension span of the MacKinnon–Dworkin belief system: Men masturbate to women being degraded, maimed, and killed. “Men come doing this. . . . It is not ideas they are ejaculating over. *Try arguing with an orgasm some time. You will find that you are no match for the sexual access and power the materials provide.*”<sup>275</sup> Thus, the overwhelming power of sex-as-pornography “sooner or later, in one way or another,” compels men to inflict violence against women, which ranges seamlessly from men's-room graffiti to sexual harassment to incest to battering to gang rape to sex murder. “[U]sing and making pornography is inextricable to [sic] these acts.” “It is only pornography that rapists use to select whom they rape and to get up for their rapes.” This result occurs “because they are

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DWORKIN, *supra* note 35, at 55 (emphasis added). See also SUSAN BROWN MILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* 5 (1976) (rape “is nothing more or less than a conscious process of intimidation by which *all men keep all women* in a state of fear”) (emphasis added).

<sup>268</sup>In the experience of intercourse, she loses the capacity for integrity because her body—the basis of privacy and freedom in the material world for all human beings—is entered and occupied; the boundaries of her physical body are—neutrally speaking—violated. What is taken from her in that act is not recoverable, and she spends the rest of her life—wanting, after all to have something—pretending that pleasure is in being reduced through intercourse to insignificance. . . . The transgression of those boundaries comes to signify a sexually charged degradation into which she throws herself, having been told, convinced, that identity, for a female, is there—somewhere beyond privacy and self-respect.

ANDREA DWORKIN, *INTERCOURSE* 137–38 (1987).

<sup>269</sup>For discussion of the problem of stereotype, see *infra* notes 358–86 and accompanying text.

<sup>270</sup>*ONLY WORDS*, *supra* note 6, at 17.

<sup>271</sup>*Id.*; *FEMINISM UNMODIFIED*, *supra* note 154, at 127–62.

<sup>272</sup>See *supra* notes 57, 119–36, and accompanying text.

<sup>273</sup>*ONLY WORDS*, *supra* note 6, at 17.

<sup>274</sup>*Id.* at 24–25.

<sup>275</sup>*Id.* at 17 (emphasis added).



sexually habituated to its kick, a process that is largely unconscious and works as primitive conditioning, with pictures and words as sexual stimuli."<sup>276</sup>

Second, the MacKinnon–Dworkin account of pornography's contents and causal relationship to consumers' sexual behavior is as closed to belief-discrepant information as is its portrait of pornography's production (discussed earlier).<sup>277</sup> An open system would examine on its own merits the empirical questions whether themes of rape, torture, murder, and other violence against women actually predominate in today's porn industry and whether exposure to porn causes its consumers to commit sexual transgressions against women. The MacKinnon–Dworkin project's allegation that they do, although consistent with that project's antipornography agenda, is not unequivocally supported by available data. One problem with the project's sweeping categorical treatment of pornography is thus that it obscures significant factual distinctions and complexities. Small wonder, then, that an important strategic objective of the project is to distinguish pornography from expression, the regulation of which is subject to close judicial scrutiny under the First Amendment.

*1. Pornography's content.* Although much sexually explicit material may suffer from a tiresome and unimaginative redundancy, not all pornography is the same in ways that presumably matter to the MacKinnon–Dworkin project. Content analyses—examining magazines such as *Hustler*, *Playboy*, and *Penthouse*; other pornographic publications; adult videos; and triple-X (i.e., hard core) videos—have reached varying results. For example, one study found themes of sexual violence in 10% of the cartoons and 5% of the pictorials in *Playboy* and *Penthouse* during 1977 and found also that violent themes increased significantly between 1973 and 1977 in pictorials but not in cartoons.<sup>278</sup> A 30-year longitudinal study found a mean rate of sexually violent themes in *Playboy* of 2.07 cartoons and 0.9 pictorials per annum between 1954 and 1983.<sup>279</sup> More recently, a longitudinal content analysis of *Hustler* magazine from 1974 to 1987 found that 0.61% of the pictorials and 0.36% of the cartoons were sexually violent, with no monotonic increase during the study period (although the average number of pictorials and cartoons increased). Another study analyzed the content of the full range of magazines available in a Times Square, New York, adult bookstore and found relatively infrequent depiction of force and sex (although within the bondage and discipline category, male dominance was more prevalent).<sup>280</sup>

Content analyses of violence in pornographic films and videos have yielded more diverse outcomes. Although neither absent nor novel, violence has been relatively rare throughout the history of pornographic film. For example, one study found that

[o]nly 5% of the 1,333 scenes from stag films produced between 1915 and 1972 contained rape[,] . . . only 12% or less of the stag films produced each decade from 1920 to 1960 contained violence[, and] that violent pornographic films never exceeded

<sup>276</sup>*Id.* at 16–20.

<sup>277</sup>See *supra* notes 220–63 and accompanying text.

<sup>278</sup>N.M. Malamuth & B. Spinner, *Longitudinal Content Analysis of Sexual Violence in the Best Selling Erotica Magazines*, 16 J. SEX RES. 226 (1980). An overview of these studies can be found in Dan Brown & Jennings Bryant, *The Manifest Content of Pornography*, in PORNOGRAPHY: RESEARCH ADVANCES AND POLICY CONSIDERATIONS, *supra* note 139, at 3, 10.

<sup>279</sup>Joseph E. Scott & Steven J. Cuvelier, *Sexual Violence in Playboy Magazine: A Longitudinal Study*, 23 J. SEX RES. 534 (1987) (noting, however, poor interrater reliability among coders).

<sup>280</sup>Brown & Bryant, *supra* note 278, at 11–12 (citing C. Winick, *A Content Analysis of Sexually Explicit Magazines Sold in an Adult Bookstore*, 21 J. SEX RES. 206 (1985)).

10% of all pornographic films produced during the 1970s, [although] the degree of violence increased over time.<sup>281</sup>

That study concluded that “[p]orn films rarely are as violent as popular general release films.”<sup>282</sup> Other studies, although taking a wider definition of violence to include verbal abuse, support the conclusion that violence is relatively rare in pornography—less frequent, for example, than on television.<sup>283</sup> Longitudinal analysis found no increase from 1972 to 1985 of themes involving “males as abusers of females, resistance to abuse, abuse without suffering, or abuse with arousal.”<sup>284</sup> When abuse was portrayed in pornographic films, however, it did tend mostly to involve male abuse of females, with little negative consequences.

Additional findings suggest that the level of male dominance and abuse in pornography is not necessarily a function of the degree of sexual explicitness. One study “revealed that adult videos featured more scenes of aggression, a higher proportion of such scenes, and more severe acts of aggression than those portrayed in triple-X videos.”<sup>285</sup> Most of that violence was male-on-male. Adult videos also had more scenes of sexual aggression, although not a significantly higher proportion, than did triple-X videos. Furthermore, “[m]easurements of sexual aggression on a combination of numerical and proportional factors revealed a trend toward decreasing sexual aggression in triple-X videos over time compared with a stable condition in adult videos.”<sup>286</sup> Moreover, content analyses have found greater gender equality in triple-X than in adult videos with respect to whether the male or female initiated the sexual activity and assumed a dominant role.<sup>287</sup> To some extent, then, the sexual content of videos and films appears to be inversely related to violence and male dominance, including sexual violence: The more sexually graphic the material, generally the less violence and more gender equality it portrays.<sup>288</sup>

2. *Pornography's consequences.* More fundamentally, the MacKinnon–Dworkin project's assertion of a causal link between pornography consumption and violence against women also greatly oversimplifies a complex array of empirical data.<sup>289</sup> Even

<sup>281</sup>Brown & Bryant, *supra* note 278, at 15 (citing J.W. Slade, *Violence in the Hard-Core Pornographic Film*, 1984 J. COMM. 148).

<sup>282</sup>*Id.* at 16 (quoting Slade, *supra* note 281, at 162).

<sup>283</sup>*Id.* at 16.

<sup>284</sup>*Id.* at 16 (citing S. Prince et al., *Power, Pleasure, and Pain in Pornographic Feature Films*, unpublished paper; T.S. Palys, *Testing the Common Wisdom: The Social Content of Video Pornography*, 27 CAN. PSYCHOL. 22 (1986)).

<sup>285</sup>Brown & Bryant, *supra* note 278, at 16 (citing Palys, *supra* note 284).

<sup>286</sup>Brown & Bryant, *supra* note 278, at 16–17.

<sup>287</sup>*Id.* at 18. For a study “from a feminist perspective” finding themes of male sexual dominance in more than one half of the sexually explicit videos from family video stores in southern California, see Gloria Cowan, *Dominance and Inequality in X-Rated Videocassettes*, 12 PSYCHOL. WOMEN Q. 299 (1988).

<sup>288</sup>Stoller's interviewees concurred. One reviewer of porn films estimated that fewer than 10% deal with rape at all, and even at that the rapist “gets his comeuppance” more so than in mainstream Hollywood. STOLLER, *supra* note 219, at 170 (interview with Jim Holliday, self-described “Pauline Kael of porn,” who has published a book reviewing 7,000 to 8,000 porn films and videos). Ron, the skeptical scriptwriter, suggested that “[w]omen in pornography are much more empowered about their sexuality than women are in feminist literature[, who are] frequently depicted as victims whose sexuality is brutalized by men. . . . [W]omen in pornography are usually depicted as sexual aggressors.” *Id.* at 208–09.

<sup>289</sup>In this respect, the MacKinnon–Dworkin project calls to mind a debate among judges of the U.S. Court of Appeals for the District of Columbia Circuit on the issue of drug addiction. Whereas Judge Skelly Wright looked to an impressive body of literature to understand the complex nature of drug addiction, its

a brief look at the literature indicates that the issue is sufficiently multifaceted and rife with uncertainty to counsel skepticism about generalizations as sweeping as those offered by the MacKinnon–Dworkin project.<sup>290</sup> Most of the social science research into this issue was prompted by the conclusion of the 1970 President's Commission on Obscenity and Pornography that available scientific evidence failed to establish a causal relationship between exposure to pornography and delinquent or criminal behavior among juveniles or adults.<sup>291</sup>

As discussed in more detail below, the results of that research defy simplistic conclusions. Those findings can be roughly summarized as follows: Laboratory research has shown some correlation between some forms of sexually explicit material and some kinds of negative attitudinal and behavioral change by men toward women (and vice versa) as well as by women toward women. There are also data showing no significant effect. Field studies also are inconclusive on the causal question; some evidence points toward a relationship, other data go the other way. Some studies suggest that pornography can even have beneficial uses. The leap from

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impact on human behavior, and the likely effect of coercive legal sanctions against drug use, Judge George MacKinnon had a much more clear-cut vision, which was unclouded by the intricacies of the data: "Judge Wright's opinion fails to recognize that the use of narcotics by addicts is the great vice. It is the use of illegal drugs by addicts that makes other crimes possible. Possession of narcotics by the addicts is at the root of the evil." *United States v. Moore*, 486 F.2d 1139, 1206 (D.C. Cir.) (en banc) (MacKinnon, J., concurring), *cert. denied*, 414 U.S. 980 (1973).

<sup>290</sup>This observation gives the project the benefit of some doubt about the coherence of its position. ONLY WORDS is frequently difficult to follow. The sense of outrage and commitment come through loudly and clearly, but the line of reasoning is sometimes obscure. For example, the book described a *Penthouse* pictorial in which "Asian women are trussed and hung" and a subsequent murder in which an Asian girl "was found strung up and sexually molested." The book mentions that the defendant "said he spent much of the day of the murder in an adult bookstore." The book then proceeds with the following passage:

Should it matter: the evidence of the harm of such materials—from testimony of victims (called evidence, not anecdotes, in court) to laboratory studies in which variables and predisposed men are controlled for, to social studies in which social reality is captured in all its messiness—shows that these materials change attitudes and impel behaviors in ways that are unique in their extent and devastating in their consequences. In human society, where no one does not live, the physical response to pornography is nearly a universal conditioned male reaction, whether they like or agree with what the materials say or not. There is a lot wider variation in men's conscious attitudes toward pornography than there is in their sexual response to it.

There is no evidence that pornography does no harm; not even the courts equivocate over its carnage anymore.

ONLY WORDS, *supra* note 6, at 36–37.

Frankly, I confess confusion about that passage's meaning. It seems to assume the key issues of causation and predisposition; and its several references to the physical response to pornography are ambiguous. If that means ensuing sex crimes, then the passage arrives back where it started—the issue of causation is assumed rather than considered. If the reference is to male erectile response, then the passage seems to be reasserting the central belief—which bears striking resemblance to authoritarian attitudes toward sexuality generally—in the intrinsic dangerousness of male sexual arousal. In either case, no data are cited to substantiate what are essentially empirical assertions. And the leap from the unjustified demand for disproof of a negative—"no evidence of no harm"—to the alleged fact of carnage is breathtaking. Finally, the MacKinnon–Dworkin project's position with respect to empirical data itself is puzzling. The foregoing passage, for example, evinces a selective ambivalence: It seems to want to invoke some data, ignore others, yet scoff at the limitations that give science its credibility; but the nature of the data referred to and their implications are opaque.

<sup>291</sup>See PORNOGRAPHY AND SEXUAL AGGRESSION at xv–xvi (Neil Malamuth & Edward Donnerstein eds., 1984); U.S. DEP'T OF JUSTICE, FINAL REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY (1970).

available data to the stubborn conclusion that porn is responsible for carnage against women thus seems more ideological than empirical.

Several examples illustrate the rugosity of this terrain and the high information cost associated with the MacKinnon–Dworkin project's fearful portrayal of, and closed-belief–disbelief system concerning, sexuality. Studies of pornography's influence on rape attitudes, for example, have reached conflicting results depending on the materials' content. Whereas some research has indicated that exposure to aggressive pornography can increase acceptance of rape myths and violence against women, other studies suggest that "the antisocial effects of aggressive pornography may be limited to stimuli depicting positive consequences of sexual aggression."<sup>292</sup> Some studies have also found a positive correlation between exposure to certain kinds of pornography and aggressive behavior against women.<sup>293</sup> More generally, Edward Donnerstein, a leading researcher in this area, has emphasized that the causal nexus between pornography and aggression against women is affected by numerous variables, including the aggressive content of the material, individual propensities to aggression, and cultural or situational factors:

*A straightforward, definitive conclusion on the relationship between pornography and aggression against women is difficult to make. While it seems that certain types of pornography can influence aggression and other asocial attitudes and behaviors towards women, this is not the case for other forms of pornography, especially nonaggressive pornography. . . . [N]onaggressive materials only affect aggression when inhibitions to aggression are quite low, or with long-term and massive exposure. With a single exposure and normal aggressing conditions, there is little evidence that nonviolent pornography has any negative effects. . . . [I]t is the aggressive content of pornography that is the main contributor to violence against women. In fact, when we remove the sexual content from such films and just leave the aggressive aspect, we find a similar pattern of aggression and asocial attitudes.*<sup>294</sup>

Other reviews of the literature also emphasize the salience of individual differences in response to sexually explicit material. For example, one review reported that "nonaggressive sexual explicitness may have a variety of antisocial effects on fantasy and interpersonal relations, but the effect was strongest among those who possess negative sexual attitudes." The authors therefore concluded that

[i]f the aim of socializing offspring to have negative sexual attitudes is to contribute to the likelihood that they will avoid later sexual problems by avoiding sexual stimuli, this technique misses the boat because it is precisely these individuals who have the greatest chance of having difficulties in this area.<sup>295</sup>

More generally, recent research has confirmed a positive correlation between

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<sup>292</sup>Neil M. Malamuth, *Aggression Against Women: Cultural and Individual Causes*, in *PORNOGRAPHY AND SEXUAL AGGRESSION*, *supra* note 291, at 19, 33. Other studies have also noted the interaction between victim reaction and callousness toward rape. *E.g.*, Edward Donnerstein & Leonard Berkowitz, *Victim Reaction in Aggressive Erotic Films as a Factor in Violence Against Women*, 41 *J. PERSONALITY SOC. PSYCHOL.* 710 (1981).

<sup>293</sup>Edward Donnerstein, *Pornography: Its Effect on Violence Against Women*, in *PORNOGRAPHY AND SEXUAL AGGRESSION*, *supra* note 291, at 53. *See also, e.g.*, John Ramirez et al., *Effects of Erotica on Retaliatory Behavior as a Function of Level of Prior Provocation*, 43 *J. PERSONALITY & SOC. PSYCHOL.* 971 (1982).

<sup>294</sup>Donnerstein, *supra* note 293, at 78–79 (emphasis added). *See also* Daniel Linz et al., *The Effects of Multiple Exposures to Filmed Violence Against Women*, 1984 *J. COMM.* 130 (summer).

<sup>295</sup>Kelley et al., *supra* note 139, at 57, 62 (citations omitted).

general authoritarianism, sex guilt, and self-reported past sexual aggression.<sup>296</sup> Another study found that

harmful effects of viewing aggressively sexual pictures were likely to occur primarily among those males with negative sexual attitudes. The associated antisocial effects are therefore not likely to be general among the population, and are probably restricted to only a portion.<sup>297</sup>

Other research, focusing on the more general attitudinal variable of male "sexual callousness" toward women, has challenged the Donnerstein conclusion that the violence content is a more significant variable than the sexual content. Such studies have explored the variables influencing behavior, short of overt violence but arguably coercive, that evince "men's disregard of, if not disrespect and contempt for, women's right to deny sexual access for whatever reason, at whatever time, and under whatever circumstances."<sup>298</sup> This research posits that "[t]he creation and maintenance of such callousness, in turn, is specific to affective experiences in which women are dominated, treated as dominion, and not granted the choices to which they are entitled."<sup>299</sup>

An important etiological agent in such affective experiences, these studies hypothesized, is pornography. One review of the literature has examined several models of callousness-generation, including the target-depersonalization model.<sup>300</sup> That model predicts that pornography, whether violent or not, will cause men to believe that disrespect for and abuse of women is not only normal but also deserved. Among the findings sought to be explained by that model are that women's display of sexual openness facilitates male aggression against them, whereas female prudishness inhibits male aggression. Following exposure to neutral material, depictions of

<sup>296</sup>William D. Walker et al., *Authoritarianism and Sexual Aggression*, 65 J. PERSONALITY & SOC. PSYCHOL. 1036 (1993).

<sup>297</sup>Kelley et al., *supra* note 139, at 62.

<sup>298</sup>Dolf Zillmann & James B. Weaver, *Pornography and Men's Sexual Callousness Toward Women*, in PORNOGRAPHY: RESEARCH ADVANCES AND POLICY CONSIDERATIONS, *supra* note 139, at 95, 98–99.

Underlying this work are theoretical assumptions about gender differences in sexual behavior, which attempt to account for the stereotype of men as sexual go-getters (i.e., indiscriminately and irresponsibly promiscuous insemination maximizers) and women as gate keepers (i.e., more discriminating and more concerned with long-term pairing to provide for support and protection during gestation and child rearing). Battle lines concerning this question are drawn mainly between biological and cultural theories. Biological determinism theories typically explain such behavioral differences in terms of evolutionary inclusive fitness. Cultural theorists have asserted that "men became choosers and takers, and women those chosen and taken, because men, mainly owing to superior build for violent action, literally beat and scared women into submission." *Id.* at 96. The MacKinnon–Dworkin antipornography campaign, like other feminist theory, appears to assume that male sexual behavior is strongly influenced by cultural norms concerning women that are in part constructed through pornography. For an overview of the issue of whether sexual difference in this regard is biologically or culturally determined, see Judges, *supra* note 248, at 1346–52 nn.81–89.

<sup>299</sup>Zillmann & Weaver, *supra* note 298, at 103.

<sup>300</sup>Social-cognition theory suggests that one's attitudes toward different kinds of sexual behavior will be influenced by the extent to which one perceives that others engage in them and with what consequences. Fantasy models predict that pornography offers a direct link to sexual fantasy that can become reified and reinforced through sexual excitation and masturbation and can possibly lead to acting out: "Sequentially, exposure to external aggressive-sexual imagery increases the probability of engaging in aggressive sexual fantasy, and the fantasies increase the probability of engaging in overt coercive behavior." *Id.* at 109 (quoting V. Greendlinger & D. Byrne, *Coercive Sexual Fantasies of College Men as Predictors of Self-reported Likelihood to Rape and Overt Sexual Aggression*, 23 J. SEX RES. 1, 8 (1987)).

consensual sex, depictions of rape, and eroticized violence, male participants rated rape as one half as violent as murder, whereas female participants rated them equally violent. Men exposed to depictions of consensual erotica and female-initiated sex tended to rate other women as more sexually permissive than did the control group, whereas women did not project permissiveness after exposure to erotica but did do so after exposure to rape themes. Exposure to erotica—especially female-instigated sex—generally tended to trivialize rape (operationally defined as the length of recommended sentence). The review concluded that

*Exposure to pornography influences the perception of women in sexual terms, making them appear more permissive and promiscuous than they actually are; greater presumed sexual permissiveness and promiscuity then mediates callous dispositions toward the sexual victimization of women, as well as leniency toward the perpetrators of callous and coercive sexual actions against them.*<sup>301</sup>

Such findings, however, present a dilemma for the would-be censor. As mentioned earlier, research has found a positive correlation between authoritarianism and sexual aggression.<sup>302</sup> That interaction is facilitated by negative attitudes toward women.<sup>303</sup> But it has been suggested that authoritarianism itself is conducive to the formation of such attitudes.<sup>304</sup> Authoritarian remedies thus may prove counterproductive, as discussed further below.<sup>305</sup>

Another study attempted to refine analysis of the dehumanization model and the effect of sexual content by testing the hypothesis that both sexually violent and nonviolent but dehumanizing pornography would have negative effects, but that nonviolent erotica would not. The study also considered individual personality variables. Its results

provide some support for the hypothesis that erotica have no antisocial impact, and, in addition, suggest that there are a number of important mediators of the effects of exposure to sexually violent and/or dehumanizing pornography. In particular, individuals with at least some minimal levels of psychoticism (who are already somewhat sexually aggressive in their attitudes and behavior) [and less sexually experienced] are more likely to be affected by exposure to pornography.<sup>306</sup>

The authors also noted that a limiting factor in the study of the effects of commercially available feature-length sexually explicit videos was that such materials are likely to contain both dehumanizing and nonviolent erotic content, even if no violent sexual content is included.<sup>307</sup>

Much of the research on the effects of pornography involves relatively low exposure levels. Some research, however, has investigated the effects of massive exposure. The results do not lend themselves to a one-dimensional conclusion in the policy debate.

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<sup>301</sup>Zillmann & Weaver, *supra* note 298, at 119.

<sup>302</sup>See *supra* note 296 and accompanying text.

<sup>303</sup>Walker et al., *supra* note 296, at 1044.

<sup>304</sup>*Id.*

<sup>305</sup>See *infra* notes 347–57 and accompanying text.

<sup>306</sup>James V.P. Check & Ted H. Guloien, *Reported Proclivity for Coercive Sex Following Repeated Exposure to Sexually Violent Pornography, Nonviolent Dehumanizing Pornography, and Erotica*, in *PORNOGRAPHY: RESEARCH ADVANCES AND POLICY CONSIDERATIONS*, *supra* note 139, at 159, 178. The authors also noted subsequent research reaching similar results using female participants.

<sup>307</sup>*Id.* at 181.

An extensive review of the literature concerning prolonged exposure to pornography found the following effects. Desensitization to pornography itself appears to occur. Both general and sexual arousal diminishes, as well as repulsion and enjoyment of common pornography (although some increased preference for less common forms, such as those involving violent themes, may occur). Changes in attitudes toward sexuality have been noted, such as increased acceptance of violations of sexual norms (including those related to sexual exclusivity) and increased belief that low levels of sexual activity pose health risks. Some studies have noted changes in relational attitudes: diminished trust among sexual intimates, decreased faith in the value of marriage as a social institution, increased dissatisfaction with the physical appearance and sexual performance of one's sexual partner, and decreased desire for offspring (with an especially strong decrease in the desire of women for female offspring). Negative changes in social attitudes have been found, including decreased sensitivity toward victims of sexual violence and trivialization of rape and child sexual abuse as crimes, men's belief in their capacity to commit rape, and increased sexual callousness. No facilitation of men's retaliatory aggression against women was found, however, from prolonged consumption of either nonviolent or violent soft-core pornography.<sup>308</sup>

Laboratory studies into the causal relationship between sexually explicit stimuli and behavior as complex and situationally dependent as sexuality necessarily have limited predictive value in the "real" world. Some investigators have therefore approached the question of pornography's effects from the opposite direction, examining the pornography-consumption habits of convicted sexual offenders. A review of such retrospective research predicted that sex offenders would show greater current pornography use, greater exposure during youth, and use of pornography to incite their crimes. The study concluded that "[a]ttempts to determine the relationship between pornography consumption and sex crimes by examining macroindicators, are fraught with difficulties," but some correlations nevertheless emerged.<sup>309</sup>

Results with respect to current use were inconclusive; it is difficult to say whether current pornography use by sexual offenders causes their transgressive behavior or evidences the existence of some other independent trait. Some studies found no difference between incarcerated sex offenders and other incarcerated offenders (although a potential confound may be an elevated consumption rate among incarcerated offenders generally). Other studies found lower consumption rates among sex offenders than among control participants (although the material in the study may have had more nondeviant appeal). An increased tendency to use pornography for masturbation and to act out scenes depicted in pornography has been noted among sex offenders but not among control participants. On the other hand, there is reason to suspect that "current pornography use may be a corollary effect of the generally sexually deviant disposition of these offenders rather than a causal process as suggested by our general theory."<sup>310</sup>

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<sup>308</sup>Dolf Zillmann, *Effects of Prolonged Consumption of Pornography*, in *PORNOGRAPHY: RESEARCH ADVANCES AND POLICY CONSIDERATIONS*, *supra* note 139, at 127; Dolf Zillmann & Jennings Bryant, *Effects of Massive Exposure to Pornography*, in *PORNOGRAPHY AND SEXUAL AGGRESSION*, *supra* note 291, at 115.

<sup>309</sup>W.L. Marshall, *Pornography and Sex Offenders*, in *PORNOGRAPHY: RESEARCH ADVANCES AND POLICY CONSIDERATIONS*, *supra* note 139, at 185, 208.

<sup>310</sup>*Id.*

Results are also inconclusive with respect to the interaction between exposure to pornography and sexual offenses by juveniles. There is some evidence that sex offenders are more likely to have been exposed to, and perhaps influenced by, pornography at a young age (6 to 10 years). Several studies found much higher rates of exposure to hard-core pornography at that age among sex offenders than among control participants. Research suggests that poorly socialized men—especially young men—are more susceptible to negative influence from pornography.<sup>311</sup> On the other hand, other retrospective research has found that alcohol consumption and prior sexual victimization of the offender, rather than exposure to pornography, were strongly related to the extent of sexual offending by adolescent males and that “most subjects reported that sexually explicit materials played no role in their commission of a sexual crime.”<sup>312</sup>

A significant problem in such retrospective research, of course, is that it provides little reliable support for causal inferences. For example, such studies do not provide any information about the number of persons exposed to pornography who do not subsequently commit sex offenses. Longitudinal research is needed to fill in that large gap in the data.<sup>313</sup>

The results with respect to incitement are also mixed but show some correlation. Laboratory studies have shown no difference between sex offenders and control participants in their preference for depictions of coercive rather than consensual sex (although sadistic rapists may have such a preference). Several studies, however, have suggested that rapists and child molesters do use pornography in an inciteful way both before and during commission of sexual offenses.<sup>314</sup> Such data, of course, do not demonstrate that such individuals would better control their deviant behavior in the absence of pornography.

Although most research has focused on hypothesized antisocial effects of pornography, some studies have suggested that some kinds of pornography can have ameliorative or even prosocial effects. A great many studies of pornography's effects use a research design in which men exposed to sexually explicit material are given an opportunity to express negative attitudes toward or to aggress against women. (Even that design has shown some beneficial effect, in that erotica tends to decrease aggression in some circumstances.<sup>315</sup>) Such designs, however, may manifest an underlying (and perhaps authoritarian) bias toward framing the issue in negativistic terms reflective of social disapprobation generally of pornography.

By contrast, a few studies have inverted the frame to give participants an opportunity to demonstrate prosocial, helping behaviors. Positive results were found. For example, “males who had viewed heterosexual explicitness subsequently and repeatedly responded more quickly to the suffering of a female confederate.”<sup>316</sup> Some investigators, challenging the hypothesized process whereby sexually explicit materials cause congruent fantasies and in turn foster a tendency to commit sexual violence against women, have suggested that “fantasy and explicitness may have a

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<sup>311</sup>*Id.* at 209.

<sup>312</sup>Judith Becker & Robert Stein, *Is Sexual Erotica Associated With Sexual Deviance in Adolescent Males?*, 14 INT'L J.L. & PSYCHIATRY 85, 93 (1991).

<sup>313</sup>*Id.* at 85.

<sup>314</sup>Marshall, *supra* note 309, at 209–10.

<sup>315</sup>John Ramirez et al., *Effects of Erotica on Retaliatory Behavior as a Function of Level of Prior Provocation*, 43 J. PERSONALITY & SOC. PSYCHOL. 971 (1982).

<sup>316</sup>Kelley et al., *supra* note 139, at 57, 60.



cathartic effect[, which] serves as a substitute for this socially unacceptable behavior.”<sup>317</sup> Furthermore, nonaggressive sexually explicit material is used in the assessment and treatment of both illegal and legal sexual deviance.<sup>318</sup> And some studies report positive results using such material in therapy of men and women with sexual dysfunction, including orgasmic dysfunction and impotence, as well as in sexual enhancement programs for nondysfunctional couples.<sup>319</sup>

More generally, a review of the literature warned that research hypotheses concerning pornography’s effects on behavior tend to be strongly self-confirming: “When social psychological research employs a powerful source of motivation and arousal such as explicit sexual themes, and then subsequently provides the opportunity for subjects to make a behavioral response of hurting or helping, confirmatory findings usually will result.”<sup>320</sup> In other words, much of the data may be more confidently interpreted as supporting the conclusion that sexually explicit materials are certainly *powerful*, but not necessarily *dangerous*, stimuli.

#### IV. Censorship as Authoritarianism

##### A. First Amendment Values

As Steven Shiffrin has noted, “[o]ne can tell a great deal about a tradition by the particular demons it sets out to exorcise.”<sup>321</sup> The MacKinnon–Dworkin crusade calls for a prodigious increase in governmental control over that particular *bête noir* of the authoritarian tradition—sexual attitudes and behavior—through the indirect regulatory effects of a civil cause of action that targets a class of filmed, videotaped, and printed representations of sexuality. Assuming (as even some supporters of the MacKinnon–Dworkin campaign’s objectives have acknowledged) that regulation of such material, unlike the proscription of rape itself, raises First Amendment concerns at all,<sup>322</sup> then the risks to First Amendment values presented by the MacKinnon–Dworkin appeal to authoritarianism ought to be taken quite seriously.

Most generally, legislative endorsement of the legitimacy of authoritarian belief systems is inherently troublesome:

[C]ensorship, like pornography, models antisocial behavior. If pornography models the utility and normativeness of violence against women, censorship models the utility and normativeness of violence against certain kinds of thought or expression. If we believe that pornography may promote generalized aggressive behavior, we must also believe that censorship may promote generalized intolerance of disliked opinion. According to the logic of pornography research, if we exposed individuals to models of lauded, official censorship, they might well become intolerant of the existence of disliked but still legitimate opinion. Prior to deciding on censorship as a remedy for pornography, research like this should be conducted to determine whether the cure is worse than the illness.<sup>323</sup>

<sup>317</sup>*Id.* at 77.

<sup>318</sup>*Id.* at 79–81.

<sup>319</sup>*Id.* at 83–84.

<sup>320</sup>*Id.* at 59.

<sup>321</sup>STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 142 (1990).

<sup>322</sup>See, e.g., Sunstein, *supra* note 49, at 19.

<sup>323</sup>William A. Fisher & Azy Barak, *Sex Education as a Corrective: Immunizing Against Possible Effects of Pornography*, *PORNOGRAPHY: RESEARCH ADVANCES AND POLICY CONSIDERATIONS*, *supra* note 139, at 289, 303.

The authoritarian subtext of the MacKinnon–Dworkin project thus contradicts the antipornography feminists' claim to be agents of liberation.<sup>324</sup>

Studies of other antipornography crusades show that they indeed tend to be dominated by the authoritarian pattern described earlier. That pattern predicts that “anti-pornography crusades as norm-oriented movements would involve elements of hostility (eradication of someone or something responsible for evils), panic (flight from existing norms or impending normative change), and craze (plunge to establish new means).”<sup>325</sup> The pornographer, the adult bookstore, and the video rental shop thus become symbols of the demonic out-group responsible for the threats perceived by the crusaders, who become convinced that their safety can be assured only by aggression against those symbols—which is, after all, justified by the evil nature of the out-group. The MacKinnon–Dworkin project, like censorship crusades elsewhere, offers everything the authoritarian could want: obsessive worry over submission to others (especially the “wrong-minded”), perception of others—and human sexuality—as threatening, the high levels of gratifying self-righteousness associated with the perception that one's values are threatened, closed-minded resistance to belief change when confronted with evidence and logic, generous use of anger and other power strategies, and frequent resort to stereotypy.<sup>326</sup>

Surely these concerns have an important place in First Amendment analysis of pornography regulation. Consider, for example, Shiffrin's approach. Like other theorists reasoning from different philosophical premises, he concluded that an authoritarian climate is not a happy one for basic First Amendment values. He has proposed that the First Amendment embodies a romanticist celebration of “dissent and defiance” that “would stand specially opposed to the authoritarian mind set.”<sup>327</sup> With respect to pornography, he observed that it could be regarded as a form of “dissent” which “rebels against the puritanical outlook of an uptight society.”<sup>328</sup> But, citing MacKinnon, he pointed out that porn can also “be regarded as a form of

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<sup>324</sup>See *supra* notes 7–9.

<sup>325</sup>LOUIS A. ZURCHER, JR. & R. GEORGE KIRKPATRICK, *CITIZENS FOR DECENCY: ANTIPORNOGRAPHY CRUSADES AS STATUS DEFENSE* 306–07 (1976). For an earlier study of censorship campaigns, see MORRIS L. ERNST & ALEXANDER LINDEY, *THE CENSOR MARCHES ON: RECENT MILESTONES IN THE ADMINISTRATION OF THE OBSCENITY LAW IN THE UNITED STATES* (1940).

<sup>326</sup>For discussion of the phenomenon of self-righteousness and closed-mindedness, see Toni Falbo & James A. Shepperd, *Self-Righteousness: Cognitive, Power, and Religious Characteristics*, 20 J. RES. PERSONALITY 145 (1986).

<sup>327</sup>SHIFFRIN, *supra* note 321, at 141–42. Emerson's classical model, for example, traces freedom of expression as a constituent element of “the great intellectual and social movement” away from “authoritarian society.” Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963). Others have advocated a Millsian autonomy-as-self-actualization model for the First Amendment, which would protect—as an intrinsic value itself—the liberty of individuals to make their own choices about receiving as well as expressing communication (broadly defined). E.g., MARTIN H. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* 21–26 (1984).

<sup>328</sup>SHIFFRIN, *supra* note 321, at 104 (citing David Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974). See also TRIBE, *supra* note 23, at 918 (notes omitted):

To some, the obscene and the pornographic depict man reduced to the sorry sum of his basest appetites; to others, obscenity eases psychosexual tensions or provides a release through fantasy, much like disaster films or soap operas, from the confines of the dreary present. To some, it represents shameless exploitation of the frustrated and the leaden, regimented, and ultimately oppressive social order.

domination,” which is “part of a social system that silences women.”<sup>329</sup> On balance, Shiffrin concluded, MacKinnon has the better of the argument.<sup>330</sup>

Presumably, Shiffrin’s conclusion derived from his perception of “the authoritarian mind set” in the “puritanical outlook,” but not in MacKinnon’s crusade. Whenever proposals to suppress sexual imagery in the name of public decency are defended by strident right-wing rhetoric<sup>331</sup> or more measured argument,<sup>332</sup> their authoritarian texture is relatively familiar and evident. But a closer look, informed by an understanding of the elements of authoritarianism, would also expose such tendencies in the MacKinnon–Dworkin proposal, even if it is defended as necessary to protect the downright oppressed rather than the merely corruptible.

If protection against government-sponsored authoritarianism lies close to the core of First Amendment goals, then the MacKinnon–Dworkin legislative proposal is properly regarded with skepticism; and the searching means–ends judicial scrutiny usually applied to such regulation is entirely appropriate. Their proposal is unlikely to survive—indeed has not survived—such examination. The foregoing section described a number of deficiencies in the evidentiary basis for the harrowing picture of porn as gynocide. The following sections offer additional reasons for misgivings about the MacKinnon–Dworkin program.

### *B. Porn as Nonspeech or Low-Value Speech*

In particular, the MacKinnon–Dworkin assertion that the First Amendment’s preferred remedy of counterspeech is impotent in the face of sex’s overwhelming power is far from convincing. MacKinnon’s challenge to “[t]ry arguing with an orgasm sometime” is rhetorically arresting but ultimately unpersuasive. Stripped to its essence, her epigram contends only that strong psychophysiological experience is unresponsive to reason and that sex has psychophysiological power of considerable magnitude, at least for men.

Those premises, together with the porn-is-abuse contention, form the core of the MacKinnon–Dworkin alternative pleading that porn is either not speech at all or speech of inherently low value and, therefore, unworthy of First Amendment protection. Their syllogism is instrumentally and logically problematic. First, as Kenneth Karst has noted, the low-value speech model presents a particular threat to women’s equality because it invites the dominant (male) group to invoke its version of reason to censor sexually oriented material that might offer a different view of sexuality that empowers women.<sup>333</sup> Experience so far under the MacKinnon–

<sup>329</sup>SHIFFRIN, *supra* note 321, at 104 (citing MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 154).

<sup>330</sup>*Id.* at 225.

<sup>331</sup>See *supra* notes 190–95 and accompanying text.

<sup>332</sup>E.g., HARRY M. CLOR, *OBSCENITY AND PUBLIC MORALITY: CENSORSHIP IN A LIBERAL SOCIETY* 194–95 (1969):

Therefore, it must be the task of modern government and law to support and promote the public morality upon which a good social life depends. Censorship can serve this end in two ways: (1) by preventing or reducing some of the most corrupt influences and (2) by holding up an authoritative standard for the guidance of opinions and judgment. . . . As legal censorship is relaxed, the private standards of many citizens may also be relaxed.

IRVING KRISTOL, *REFLECTIONS OF A NEOCONSERVATIVE* 45–47 (1983) (“We are dealing with a general tendency that is suffusing our entire culture. . . . When sex is a public spectacle, a human relationship has been debased into a mere animal connection”).

<sup>333</sup>Kenneth L. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*,

Dworkin law in Canada—where gay and lesbian bookstores have been targeted and feminist works, including two books by Dworkin herself, have been seized as obscene—tends to validate Karst's caveat.<sup>334</sup>

Second, the MacKinnon–Dworkin premises are consistent with the Berkeley group's authoritarian model of an uncontrollable id overwhelming a weak ego and therefore requiring massive superego intervention, and the group terms in which those premises are expressed reflect authoritarian tendencies toward stereotypy.<sup>335</sup> But their position is unconvincing. For one thing, in some of its incarnations, the argument smacks of the oversimplified, strawman version of the speech–conduct distinction described and then decried by MacKinnon herself.<sup>336</sup> For another, the MacKinnon–Dworkin project's passion–reason dichotomy relies on obsolete Cartesian mind–body dualism.<sup>337</sup> In any event, the more plausible suggestion that affect and reason operate in interrelated psychological realms is hardly a persuasive defense of censorship. Furthermore, the group-based indictment of an assumed stereotypic male behavioral response to sexual stimuli ignores sexuality research in which, notwithstanding female–male differences in affective and evaluative responses to sexual stimuli,

[r]elatively few female–male differences were noted regarding *behavioral* responses to sexual stimuli. Depending on variables such as sexual experience, availability of sexual partners, and situational factors, both sexes are more likely to do something sexual following exposure to sexual stimuli, be it fantasize, talk about sex, masturbate, or engage in coitus.<sup>338</sup>

More generally, a considerable body of respectable psychological theory and psychotherapeutic technique recognizes that the thoughts and beliefs one chooses to adopt can substantially affect how one feels, and that people are not mere puppets dancing on the strings of unchecked passion.<sup>339</sup>

Finally, the spurious passion–reason dichotomy confuses the two sex systems that humans actually do have: one that is responsive to friction (through a reflex arc between the sex organs and the lower spinal cord) and the other to fantasy. In fact, “[t]he reflexive nature of the friction system is demonstrable in males when spinal cord damage prevents genital sensations from reaching the brain. If the genitals are

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1990 U. ILL. L. REV. 95. See also Strossen, *supra* note 15, at 1140–43, 1163–65.

<sup>334</sup>See Strossen, *supra* note 15, at 1146–47.

<sup>335</sup>See *supra* notes 264–319 and accompanying text.

<sup>336</sup>For the view that pornography “shares more of the characteristics of sexual activity than of the communicative process,” see Schauer, *supra* note 40, at 922. For a rebuttal of Schauer’s argument, see Steven G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as an Act and Idea*, 86 MICH. L. REV. 1564 (1988).

<sup>337</sup>For an informal overview of mind–body dualism, see MORTON HUNT, *THE STORY OF PSYCHOLOGY* 62–68, 89, 155, 257 (1993).

<sup>338</sup>William Griffith, *Females, Males, and Sexual Responses*, in *FEMALES, MALES, AND SEXUALITY* 141, 165 (Kathryn Kelley ed., 1987) (emphasis added).

<sup>339</sup>E.g., AARON T. BECK ET AL., *COGNITIVE THERAPY OF DEPRESSION* (1979); AARON T. BECK ET AL., *COGNITIVE THERAPY OF PERSONALITY DISORDERS* (1990); RIAN E. McMULLIN, *HANDBOOK OF COGNITIVE THERAPY TECHNIQUES* (1986); KEITH HAWTON, *COGNITIVE-BEHAVIOUR THERAPY FOR PSYCHIATRIC PROBLEMS: A PRACTICAL GUIDE* (1989); *COGNITIVE-BEHAVIOR THERAPY: RESEARCH AND APPLICATION* (John Paul Foreyt & Diana P. Rathjen eds. 1978); *COGNITIVE BEHAVIORAL INTERVENTIONS: THEORY, RESEARCH, AND PROCEDURES* (Philip C. Kendall & Steven D. Hollon eds., 1979).

stimulated by rubbing, it is possible for erection and orgasmic capacity to be retained for awhile."<sup>340</sup>

The MacKinnon–Dworkin argument ultimately proves too much; for one might similarly note the emotive power of many phenomena, including the shock value of a good portion of the rhetoric of the MacKinnon–Dworkin project itself.<sup>341</sup> As William Paley quipped, “who can refute a sneer?”<sup>342</sup> Cognitive grasp of the relative merits of simple melodic construction and ascending tones are neither necessary nor particularly relevant to the experience of the emotional bombshell of Henryk Górecki’s “Symphony Number Three.” Try arguing with a goosebump sometime. The point of course is not that pornography exists at any level aesthetically, spiritually, or intellectually commensurate with that masterpiece. The point instead is that, in addition to the familiar notion that First Amendment doctrine has long distinguished between imaginal representation and actual behavior,<sup>343</sup> affective intensity (which inevitably manifests in a combination of physiological reactions) itself is a commonplace experience that most people learn to mediate. Its occurrence demonstrates neither the absence of communication (quite the contrary) nor the appropriateness of state intervention. Discomfort with it, however, especially as it relates to sexuality, does suggest the operation of authoritarian processes.

More concretely, as with other empirical assumptions underlying the MacKinnon–Dworkin project, their assumption with respect to the impotence of counterspeech is overstated and unsupported by available data. There is some evidence that the negative attitudinal effects attributed to some pornography are amenable to change. For example, participants exposed to depictions of sexual violence (both pornographic and nonpornographic) who were appropriately debriefed “emerged from this experience more sensitive to the issues of violence against women and myths about rape than before participation.”<sup>344</sup> Other affirmative education programs to undo the target-depersonalization effects of sexual violence in the media and to dispel rape myths also have shown promising results.<sup>345</sup> Also, some social scientists have proposed school-based sex education programs “to produce highly generalized rejection of the antisocial messages that pornography may convey.”<sup>346</sup>

### C. Censorship as Counterproductive

The MacKinnon–Dworkin project’s proposed remedy reflects the authoritarian’s proclivity toward coercive and punitive measures. There is reason to doubt the efficacy of such measures in the reformation of attitudes toward a healthier sexuality.<sup>347</sup> Quite apart from the likelihood that application of such approaches to

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<sup>340</sup>LEE WILLERMAN & DAVID COHEN, *PSYCHOPATHOLOGY* 537 (1990) (citing H.S. KAPLAN, *THE NEW SEX THERAPY* (1974); W.H. Masters Et AL., *Human Sexuality* (1982)). Orgasmic capacity is lost, however, in females who sustain such spinal injury.

<sup>341</sup>See, e.g., *supra* note 41 and text accompanying note 216.

<sup>342</sup>WILLIAM PALEY, *PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY* 5, Ch. 9 (1785), *quoted in* THE OXFORD DICTIONARY OF QUOTATIONS 368 (3d ed. 1980).

<sup>343</sup>See Gey, *supra* note 336, at 1585–86 (“The first amendment permits many things to be experienced second-hand through print or videotape that cannot be done in person”).

<sup>344</sup>Daniel Linz & Edward Donnerstein, *The Effects of Counter-Information on the Acceptance of Rape Myths*, in *PORNOGRAPHY: RESEARCH ADVANCES AND POLICY CONSIDERATIONS*, *supra* note 139, at 259, 284.

<sup>345</sup>*Id.*

<sup>346</sup>Fisher & Barak, *supra* note 323, at 289.

<sup>347</sup>In addition, this enthusiasm for adversarial litigation remedies, although politically tempting

forms of expression will conflict with our most basic constitutive values, they may actually have counterproductive consequences. First, as mentioned earlier, authoritarianism has been found to correlate positively with erotophobia, which in turn has shown some link to negative socialization experiences involving, among other things, sex guilt and avoidance of erotica.<sup>348</sup>

Second, psychological reactance theory predicts that in some circumstances efforts to censor communication not only increase the desire for that information but also result in attitude change in a direction opposite to that attributed to the forbidden communication (boomerang effect).<sup>349</sup> The magnitude of reactance is affected by two subjective variables. One is the importance of the freedom (i.e., its instrumental value to the satisfaction of individual needs and desires and its irreplaceability), another is the salience of the freedom's potentiality (in other words, even when not activated, whether the potential need or desire nevertheless lies close to the surface).

The MacKinnon-Dworkin project's own views on the overwhelming motivational potential of sexuality and sexually explicit material suggests a high reactance effect for censorship of pornography. Reactance theory predicts that threats to a particular freedom (even implicit threats such as those posed by the "slippery slope" problem), such as the freedom to form one's own sexual attitudes or to consume pornography, will have a negative influence that varies positively with the importance of the freedom. In other words, threats to a perceived freedom having the animating puissance associated with sexuality are likely to provoke a strong negative reaction.

At least one study indicated that reactance theory describes reaction to threats

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(especially to power-oriented authoritarians), may prove unwise. Such an approach entails substantial costs, both to society in general and to the parties directly involved. Those costs are financial, psychological, and philosophical: administrative costs can be astronomical, over- and undercompensation is common, the process is grueling and stressful for the participants, and the outcome may produce indirect regulatory effects that compromise important values such as individual self-determination. The limitations of such systems' ability to accomplish desired regulatory and compensatory goals, and their potential to inflict considerable harm, have been exposed in powerful critiques of the tort system as a means to control risk and to address the cost of accidents. For an overview of such critique, and application to the value of individual autonomy in the context of risk choice, see Donald P. Judges, *Of Rocks and Hard Places: The Value of Risk Choice*, 42 EMORY L.J. 1 (1993). Such concerns counsel against uncritical acceptance of the affectively charged advocacy of yet another set of broad litigation remedies to address a perceived problem.

These issues merit especially careful consideration in a proposal with the focus and reach of the MacKinnon-Dworkin project. An invitation to government greatly to increase its role in shaping and controlling sexual attitudes and behaviors is not to be extended without the most careful consideration. Given the breadth of the project's definition of actionable material, an enormous volume of litigation can be anticipated. Indeed, it might take nothing short of a cultural revolution to even begin to eradicate the disfavored attitudes. This country's experience with coercive attempts to prevent consumption of other substances deemed deleterious to the public welfare, such as alcohol and other drugs, have had little success in changing behavior but instead have seriously compromised civil liberties, invited selective enforcement, and fueled a vast underground criminal market.

<sup>348</sup>Fisher et al., *supra* note 122, at 134-35.

<sup>349</sup>SHARON S. BREHM & JACK W. BREHM, *PSYCHOLOGICAL REACTANCE: A THEORY OF FREEDOM AND CONTROL* 37-56 (1981). Reactance theory hypothesizes a tendency to protect decisional and behavioral autonomy with respect to specific, realistically available, and known choices. In other words, the theory predicts that individuals will act to protect freedom with respect to realms that are perceived as free. The theory is behavior-specific and molecular; it does not deal with the molar issue (considered, e.g., by Fromm) of whether people have an intrinsic orientation toward liberty generally or a desire to escape freedom's burdens.

to perceived sexual self-determination, rather than simply to libidinal gratification. When male participants were told that they were expected to become sexually aroused (measured by pre- and postexposure production of urinary acid phosphate) while watching a pornographic film, their acid phosphate production actually decreased. The difference was significant between the experimental participants and the control group, who were incorrectly informed that the experiment involved the film's effect on projective test results.<sup>350</sup> Other studies have found a boomerang effect in censorship (by redaction) of nonaggressive, sexually explicit films and of sexually violent films (by provision of a warning label).<sup>351</sup>

Next, it is far from clear that censorship will produce the desired result of reducing the incidence of violence against women. For one thing, sexual aggression itself may be encouraged in a general way by the promotion of authoritarian attitudes.<sup>352</sup> For another, even a study that advocates the proposition that restrictive control of pornography can contribute to a reduction in sexual violence against women recognizes the difficulties of establishing such a causal relationship. It goes no further than to suggest that, "while one cannot exclude a causal relationship, it is safer to assume a multifactorial situation in which pornography is playing a significant part."<sup>353</sup> That study also conceded that "not all types of pornography are equally implicated" and recognized the stronger likelihood of a causal link between porno-violence and rape.<sup>354</sup> Another study found a strong correlation between the rate of circulation of sex magazines and the incidence of rape from state to state, but the authors were hesitant to assign a causal relationship.<sup>355</sup> Other studies have questioned the proposition that controlling pornography will produce lower rape rates. For example, one cross-cultural comparison of the availability of rape stimuli with the incidence of rape in Japan concluded that

If there is a direct connection between the prevalence of rape imagery and rape behavior, Japan should have an overwhelming occurrence of rape. [But] it does not. Consequently, it is our suggestion that mediating circumstances are involved, especially in the form of internal constraints to maladaptive behavior.<sup>356</sup>

More generally, even when some correlation between intricate social phenomena can be shown, one should be cautious in knee-jerk assignments of a causal

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<sup>350</sup>*Id.* at 77 (citing Andrew M. Barclay, *Information as a Defensive Control of Sexual Arousal*, 17 J. PERSONALITY & SOC. PSYCHOL. 244 (1971)).

<sup>351</sup>Kelley et al., *supra* note 139, at 64–65.

<sup>352</sup>Walker et al., *supra* note 296, at 1036–44.

<sup>353</sup>John H. Court, *Sex and Violence: A Ripple Effect*, in PORNOGRAPHY AND SEXUAL AGGRESSION, *supra* note 291, at 143, 167.

<sup>354</sup>*Id.* at 167–68. Court suggested, however, that even nonviolent pornography can contribute both to negative attitudes toward women that facilitate a rape-conducive social environment and to the proliferation and acceptance of porno-violence.

<sup>355</sup>Larry Baron & Murray A. Straus, *Sexual Stratification, Pornography, and Rape in the United States*, in PORNOGRAPHY AND SEXUAL AGGRESSION, *supra* note 291, at 185, 206.

<sup>356</sup>Paul R. Abramson & Haruo Hayashi, *Pornography in Japan: Cross-Cultural and Theoretical Considerations*, in PORNOGRAPHY AND SEXUAL AGGRESSION, *supra* note 291, at 173, 181. Moreover, the liberalization of restrictions on pornography in Denmark has not been accompanied by an increase in the incidence of rape above the overall crime rate. To the contrary, the incidence of some sexual offenses has actually declined and the rate rape has generally held steady, despite an overall increase in the crime rate. Berl Kutchinsky, *Pornography and its Effects in Denmark and the United States: A Rejoinder and Beyond*, 8 COMP. SOC. RES. 301 (1985).

relationship. One study, for example, actually found that "there is a significant tendency for rape to increase as the status of women increases."<sup>357</sup> Arguments that censorship of materials depicting sexual inequality is justified as an antirape measure thus may be oversimplified. That study certainly did not promote inequality as an antidote to rape; instead, it suggested that the interaction may be complex, involving perhaps some male backlash and a reporting effect whereby women are more inclined to report rape as their social position improves.

#### *D. Censorship as Stereotype*

To the extent that advocacy of the MacKinnon-Dworkin project contributes to an increase in the overall societal level of authoritarianism, it may also adversely affect women's equality in an indirect sense. For example, as mentioned, authoritarianism has been associated with traditional sex role differentiation.<sup>358</sup> Although such an indirect interaction is difficult if not impossible to prove, the overlap between the goals of the MacKinnon-Dworkin project and the antipornography agenda of the fundamentalist right is reason for concern.<sup>359</sup>

More generally, the authoritarian patterns of group orientation, focus on power and dominance, and closed-mindedness—all of which are abundantly evident in the MacKinnon-Dworkin crusade—may undermine their asserted goal of equality when translated into legal policy based on stereotype. Sexual stereotypes invite "descriptive reification," in which assessments of potential and estimates of probability with respect to sexual distribution of behaviors, attitudes, and outlooks that may statistically tend to be associated with sex often quietly slip into "inflexible and often ephemeral conceptions of the nature of woman and man."<sup>360</sup>

That process becomes problematic when the existence of impressionistic or statistical difference is used to justify legal decisions based on stereotype. One function of the heightened judicial scrutiny applied under equal protection principles is to expose governmental reliance on "archaic and overbroad" stereotypes lurking behind a mask of purportedly legitimate policy concerns.<sup>361</sup> Underlying those

<sup>357</sup>Baron & Straus, *supra* note 355, at 206.

<sup>358</sup>Campbell, *supra* note 73, at 112–13.

<sup>359</sup>See *supra* notes 190–95 and accompanying text. For an argument that feminist opposition to pornography is motivated by very different concerns from those of religious fundamentalists, see Gloria Cowan et al., *Feminist and Fundamentalist Attitudes Toward Pornography Control*, 13 PSYCHOL. WOMEN Q. 97 (1989). The study was based on interviews with 44 women.

<sup>360</sup>Kay Deaux & Brenda Major, *A Social-Psychological Model of Gender*, in THEORETICAL PERSPECTIVES, *supra* note 205, at 89, 90. Thus, using "a set of fallible indicators (e.g., a list of interests, opinions, or attitudes) . . . to indicate the likelihood that one is male (a categorical classification) [rather than] the degree to which one is masculine (a dimensional classification)" risks arbitrariness, unreliability, poor information retention (because "[m]embers and nonmembers of a category tend not to be homogenous with respect to criteria that were used to make the [classification]"), and inflexibility across a range of applications. Thomas A. Widiger & Allen J. Frances, *Toward a Dimensional Model for the Personality Disorders*, in PERSONALITY DISORDERS AND THE FIVE FACTOR MODEL OF PERSONALITY 19, 19–24 (Paul T. Costa, Jr. & Thomas A. Widiger eds., 1994).

<sup>361</sup>*E.g.*, J.E.B. v. Alabama ex rel. T.B., 114 S.Ct. 1419 (1994) ("We shall not accept as a defense to gender-based peremptory challenges 'the very stereotype the law condemns'." *Id.* at 1426–27 (quoting Powers v. Ohio, 499 U.S. 400, 410 (1991)); Weinberger v. Wiesenfeld, 420 U.S. 636, 642–43 (1975) (Social Security Act's distinction between men and women in award of survivor's benefits rests on "archaic and overbroad" stereotypes about the male role as breadwinner); Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality) (similar conclusion with respect to armed services' dependent allowance). For an argument



principles are strong moral and political objections to governmental use of characteristics such as race or gender as proxies for stereotypic generalizations in the allocation of rights and benefits (even if some correlation exists between characteristic and stereotype). First, such "[sex- or] race-based decisions that are rational and purport to be based solely on legitimate considerations are likely in fact to rest on assumptions of the differential worth of [sex-based and] racial groups or on the related phenomenon of [sexually or] racially selective sympathy and indifference."<sup>362</sup> That stigmatic phenomenon is the "unconscious failure to extend to [the disfavored group] the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to one's own group."<sup>363</sup> Second, the political process distortions that result when one group is excluded because of morally irrelevant or suspect characteristics are at odds with the emphasis on connection and inclusion urged by many feminist writers.<sup>364</sup>

These observations also warn that stereotyping can violate ethical precepts held by many feminists (although not MacKinnon).<sup>365</sup> First, stereotypes are antithetical to true human relations and mutual respect. They encourage one to encounter another person not as the unique individual the other really is but as the abstract construction the stereotype depicts him or her as being.<sup>366</sup> According to some feminists, caring and connection arise in actual interpersonal relations rather than through intellectualized ideal.<sup>367</sup> One cares about a person for himself or herself, not for his or her membership in a class alleged to possess qualities one might value.<sup>368</sup>

Second, stereotypes can hurt. Stereotypes are the first long step down the path of dehumanizing self and others, a process that experience teaches all too easily facilitates the infliction of group-based harms that one might otherwise consider morally repugnant if done individually to someone about whom one personally cared. Stereotypes promote the infliction of harm by increasing both intra- and extrapsychic distance and, thus, diminishing connection, care, and a sense of moral responsibility between individuals.<sup>369</sup>

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that the Court's equal protection jurisprudence yet has far to go with respect to rooting out such stereotypes, see Wendy Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175 (1982).

<sup>362</sup>Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 6-7 (1976).

<sup>363</sup>*Id.* at 7-8.

<sup>364</sup>For an overview of the antidiscrimination principle and an application of it, in terms that bridge the polarities of individualism and collectivism, see Judges, *supra* note 157. For description of this feminist perspective, see Judges, *supra* note 248, at 1329-45, 1381-92.

<sup>365</sup>For an overview of the feminist values of relation and care, see Judges, *supra* note 248, at 1329-40.

<sup>366</sup>This is one risk of affirmative action programs, which often are justified in collectivist terms. See Judges, *supra* note 157.

<sup>367</sup>See Judges, *supra* note 248, at 1329-40, 1381-92.

<sup>368</sup>See John Hardwig, *Should Women Think in Terms of Rights?*, 94 ETHICS 441 (1984); Lawrence A. Blum, *Gilligan and Kohlberg: Implications for Moral Theory*, 98 ETHICS 472, 474-75 (1988) ("The moral agent must understand the other person as the specific individual that he or she is, not merely as someone instantiating general moral categories such as friend or person in need").

<sup>369</sup>Social psychologists have suggested a differential self-awareness theory that describes two alternative ways in which group orientation can facilitate the disinhibition of harmful behaviors toward others. Stereotyping (i.e., exaggeration or fabrication of in-group vs. out-group differences) can foster (a) the process of deindividuation (i.e., the "loss of self consciousness and submergence in collective activity") as well as (b) diffusion of responsibility. Steven Prentice-Dunn & Ronald Rogers, *Deindividuation and the Self-Regulation of Behavior*, in PSYCHOLOGY OF GROUP INFLUENCE 87 (Paul B. Paulus ed., 2d ed. 1989) [hereinafter Prentice-Dunn & Rogers, *Self-Regulation*]. Arousal of group cohesiveness (e.g., by focusing

The literature is increasingly examining the ways in which stereotyping contributes to the subordination of disadvantaged groups. For example, Nancy Ehrenreich has described how "ideological imagery facilitates and legitimates the subordination of different types of women."<sup>370</sup> As Ehrenreich and the sources she cites pointed out, disparaging stereotypes of women abound. She offers the following quote:

My mother used to say that the black woman is the white man's mule and the white woman is his dog. Now, she said that to say this: we do the heavy work and get beat whether we do it well or not. But the white woman is closer to the master and he pats them on the head and lets them sleep in the house, but he ain' gon' treat neither one like he was dealing with a person.<sup>371</sup>

The quoted passage may very well capture the experience of many women, Black and White, today and yesterday. And it may describe the behavior of many men.

The problem, however, is that while Ehrenreich and others—including MacKinnon and Dworkin—are decrying several sets of disparaging stereotypes, they are busy propagating others.<sup>372</sup> Although there may be instrumental political value for the struggle for equality and justice in raising consciousness about oppression, recourse to stereotypes does inflict harm. Many men do not treat women like either mules or dogs. It demeans the integrity of such men and the women in their lives, and it trivializes the enormity of real racism and sexism, to assert categorically that they do. It becomes especially troubling—even frightening—when such stereotypes are written into law, as the MacKinnon–Dworkin project advocates.

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on racial or sexual stereotypes) has been found to cause deindividuation by reducing private self-awareness (i.e., one's awareness of thoughts, feelings, and perceptions), thus disabling the psychological behavior-regulating mechanisms of either natural care or internalized norms of social propriety. In other words, "uninhibited acts may result from decreased cognitive [and affective] mediation of behavior." *Id.* at 94.

Anonymity and diffused responsibility (produced, e.g., by identification with a group defined by race or sex) "reduce individual accountability for acts by making the individual less aware of the public aspects of himself" (i.e., "concern about one's appearance and the impression made in social situations"). *Id.* at 93–94. Harmful behavior thus "results from a group member's active calculations that his or her attacks on another person will not be subject to scrutiny and possible retaliation from victims and authority figures." *Id.* at 94. For discussion of responsibility diffusion, see Albert Bandura, *Behavior Theory and the Models of Man*, 29 AM. PSYCHOLOGIST 859 (1974). And "[s]everal studies have now demonstrated that deindividuating contexts can facilitate violence in groups." Prentice-Dunn & Rogers, *supra*, at 99. This phenomenon has been observed in a cross-cultural survey that sampled over 200 cultures and found that deindividuation was "significantly related to torturing and mutilating the enemy in warfare." *Id.* at 100. One study of American participants (all White) found that "collective aggression [was] very sensitive to the race of their victim." *Id.* (citing Ronald W. Rogers & Steven Prentice-Dunn, *Deindividuation and Anger-Mediated Interracial Aggression: Unmasking Regressive Racism*, 41 J. PERSONALITY & SOC. PSYCHOL. 63 (1981)). Another, archival study of the severity of atrocities committed by lynch mobs found that "as the lynchers became less self-attentive, or more deindividuated, [there occurred] a breakdown in normal self-regulation processes, which in turn led to an increase in the transgressive behaviors represented by the composite index of atrocity." Prentice-Dunn & Rogers, *Self-Regulation*, *supra* at 100 (quoting B. Mullen, *Atrocity as a Function of Lynch-Mob Composition: A Self-Attention Perspective*, 12 PERSONALITY & SOC. PSYCHOL. BULL. 187, 187 (1986)). For an intriguing lay anecdotal account of the phenomenon of disinhibition through both deindividuation and responsibility diffusion, see BILL BUFORD, *AMONG THE THUGS: THE EXPERIENCE, AND THE SEDUCTION, OF CROWD VIOLENCE* (1991).

<sup>370</sup>Nancy Ehrenreich, *The Colonization of the Womb*, 43 DUKE L.J. 492, 506–30 (1993).

<sup>371</sup>*Id.* at 506 (quoting JOHN L. GWALTNEY, *DRYLONGSO: A SELF-PORTRAIT OF BLACK AMERICA* 148 (1980) (quoting interview of Nancy White, a 73-year-old Black woman)).

<sup>372</sup>See, e.g., *supra* notes 266–74 and accompanying text.

One example of this reverse stereotyping that is particularly relevant to the MacKinnon–Dworkin crusade arises in the issue of domestic violence. Research has called into question the common stereotypic assumption that violence between intimates almost exclusively involves men as aggressive perpetrators and women as passive victims.<sup>373</sup> To be sure, some researchers, although they are not challenging the data showing that many women do commit acts of violence against their male partners, have suggested that (a) because men typically are larger and physically stronger than women, they usually inflict more serious harm when they hit, and (b) “nearly three-fourths of the violence committed by women is done in self-defense.”<sup>374</sup> Others have observed, however, that

the percentage of female-perpetrated violence that is in response to male violence is not known, just as we do not know the extent to which women or men contribute to the production of physical violence by engaging in verbally assaultive behavior. We do know, however, that women have higher mean *and* median rates for perpetrating severe violence, suggesting that female aggression is not merely a response to male aggression. Similarly, we do not know the extent to which male or female homicides are the result of earlier verbal, emotional, and physical abuse. Yet we have no dispute with the common assumption that much of women’s violence is in response to male violence, just as we have no dispute with the common assumption that women often contribute to the production of physical violence by being verbally assaultive. We simply do not claim to know the degree to which either of these assumptions are accurate.<sup>375</sup>

Another horrifying stereotype, also invoked by the MacKinnon–Dworkin project, is that child abuse is almost exclusively perpetrated by men.<sup>376</sup> Once again, the data suggest that women too “are involved substantially in child abuse, including the most serious form of abuse: Child killings.”<sup>377</sup> One researcher has noted that women are more likely than men to abuse children and that male children are more than two times as likely to be physically injured.<sup>378</sup> She has suggested that the higher incidence of child abuse by women may be a factor of the greater amount of time that women

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<sup>373</sup>See, e.g., SUZANNE K. STEINMETZ, *THE CYCLE OF VIOLENCE: ASSERTIVE, AGGRESSIVE, AND ABUSIVE FAMILY INTERACTION* at xvi, 6, 87–97 (1977); Suzanne K. Steinmetz, *The Battered Husband Syndrome*, 2 VICTIMIZATION 499 (1978); R.L. McNeely & Gloria Robinson-Simpson, *The Truth About Domestic Violence: A False Framed Issue*, 32 SOC. WORK 485 (1987). For criticism of that research, see, e.g., E. Pleck et al., *The Battered Data Syndrome: A Comment on Steinmetz’s Article*, 2 VICTIMOLOGY 680 (1978); Daniel G. Saunders, *Other “Truths” About Domestic Violence, A Reply to McNeely and Robinson-Simpson*, 33 SOC. WORK 179 (1988); Lenore E.A. Walker, *Psychology and Violence Against Women* 44 AM. PSYCHOLOGIST 695 (1989).

<sup>374</sup>RICHARD J. GELLES & MURRAY A. STRAUS, *INTIMATE VIOLENCE* 90 (1988).

<sup>375</sup>R.L. McNeely & Gloria Robinson-Simpson, *The Truth About Domestic Violence Revisited: A Reply to Saunders*, 33 SOC. WORK 184, 186 (1988). See also Douglas E. Mould, *Data Base or Data Bias?*, 45 AM. PSYCHOLOGIST 676 (1990) (arguing that the data tend to refute the “claim that most violence by women is a reaction to men’s violence against them”). One writer has suggested that there is a need to distinguish the effects of female and male violence and has proposed scales to evaluate female violence against men. Linda L. Marshall, *The Severity of Violence Against Men Scales*, 7 J. FAM. VIOLENCE 189 (1992).

<sup>376</sup>E.g., JUDITH LEWIS HERMAN, MD, *TRAUMA AND RECOVERY* 32 (1992) (“There is a war between the sexes. Rape victims, battered women, and sexually abused children are its casualties”).

<sup>377</sup>McNeely & Robinson-Simpson, *supra* note 375, at 186.

<sup>378</sup>Suzanne K. Steinmetz, *Women and Violence: Victims and Perpetrators*, 34 AM. J. PSYCHOTHERAPY 339 (1980). See also McNeely & Robinson-Simpson, *supra*, note 375, at 186 (reporting research finding that males are typically the victims of infanticide in the United States and that mothers are often involved in “brutal homicides”).

tend to spend with children. Another study concluded that "[s]uch a finding fits with our view that gender, itself, does not predict abuse."<sup>379</sup>

Perhaps the most virulent stereotype in this area is that sexual abuse of children is almost exclusively perpetrated by men and mostly upon girls. Only recently has it been suggested that the incidence of sexual abuse of children (including girls) by women, especially by mothers or other close relatives, may be much greater than is commonly assumed.<sup>380</sup> Research in the United States also indicates that the incidence of women's sexual contact with boys is higher than clinicians have believed.<sup>381</sup> Sexual stereotypes—including the male-as-sexual-aggressor-female-as-sexual-victim stereotype endorsed by the MacKinnon-Dworkin project—have contributed to serious underreporting of sexual offenses perpetrated by women.<sup>382</sup> Not surprisingly, but perhaps ironically, the alleged victims reportedly have encountered re-abuse in the form of vigorous denial, disbelief, and refusal of help, especially from group-oriented advocates who fear that attention will be distracted from the problem of abuse by men.<sup>383</sup>

The purpose in raising these issues is neither to blame the victims nor to exonerate the abusers. Quite the contrary, the point is to illustrate the potential for harm to everyone from stereotypes and the concomitant tendency toward group identification (and thus misogyny or misandry). McNeely and Robinson-Simpson were close to the mark when they observed:

The socially constructed "ownership" of domestic violence by a single gender group ultimately serves to fragment the array of resources, human and otherwise, needed to address the problem successfully. More importantly, it perpetuates the divisiveness so common in our society. We simply do not need to encourage artificial divisiveness among men and women any more than we need to encourage or maintain divisions between the races, the age groups, the healthy versus the infirm, or those with different sexual orientations. . . . [L]abelling domestic violence as a "women's issue" tends to villify men simply because they are men, ignores the fact that many men are victimized, creates conditions that diminish the involvement of men in solving the problem, and leads to the development of remedies that do not address the full scope of the problem. After all, we are all victimized by the ugly problem of domestic violence, just as we are all victimized by racism; if not directly, then indirectly.<sup>384</sup>

Furthermore, if, as some feminists have contended, portraying women in subordinated roles contributes to their oppression (including through identification with the oppressor's construction of reality), perhaps stereotypically portraying men as, at best, relationally irresponsible and, at worst, innately evil abusers also has adverse consequences.<sup>385</sup>

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<sup>379</sup>*Id.*

<sup>380</sup> See generally FEMALE SEXUAL ABUSE OF CHILDREN: THE ULTIMATE TABOO (Michele Elliott ed., 1993).

<sup>381</sup> E.g., Sylvia Robbins Condry et al., *Parameters of Sexual Contact of Boys with Women*, 16 ARCHIVES SEXUAL BEHAV. 379 (1987).

<sup>382</sup> Kathryn T. Jennings, *Female Child Molestation: A Review of the Literature*, in FEMALE SEXUAL ABUSE OF CHILDREN: THE ULTIMATE TABOO, *supra* note 380, at 241, 243.

<sup>383</sup> See, e.g., Jeremy Laurance, *Child Victims Ignored*, THE TIMES, Apr. 1, 1992 (London) ("Children who have been sexually abused by women are being denied help by caring organisations because professional staff do not believe that female sexual abuse takes place").

<sup>384</sup> McNeely & Robinson-Simpson, *supra* note 375, at 184.

<sup>385</sup> Thus, perhaps the sugar-and-spice-and-everything-nice-snips-and-snails-and-puppy-dog-tails approach to difference, and the more ideologically violent accusation that men are incipient rapists and

As discussed earlier, the MacKinnon–Dworkin project’s stereotypically skewed description of production harm diverts attention from concerns that are more prosaic but probably more important to the actors in pornographic productions. The authors’ dogmatic insistence on an exaggerated, sensational, and demonized version

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oppressors and women chronic powerless victims, also can have a destructive effect on the way men and women view themselves and each other. For an example of the latter accusation, see *supra* note 267. For a somewhat strident objection to that perspective, see Gerald Schoenewolf, *The Feminist Myth About Sexual Abuse*, 18 J. PSYCHOHISTORY 331 (1991).

A recent unfortunate example of the harm that can occur was an Issues in Feminist Art class project at the University of Maryland, purportedly intended to highlight the issue of sexual assault, which posted leaflets around campus warning that “these men are potential rapists.” The men’s names listed on the leaflets were selected at random from a student telephone directory. The nine women art students also erected a wall with the names of 15,000 male students (almost every man in the phone book) under the heading “these men could be rapists.” See Lisa Leff, *Kirwan Denounces Art Project; U-Md. President Calls Listing of “Potential Rapists” Regrettable*, WASH. POST, May 11, 1993, at B4. Another example is debate over the proposal that men be banned from working with children. See, e.g., Angela Neustatter, *Should Men Work With Children?*, THE INDEPENDENT, Apr. 25, 1993, at 22.

If it harms women to portray them as typically submissive, weak, and irrational, how can it not harm men to portray them as typically abusive and self-centered (or, in an increasingly common inversion of stereotypes—see Steinmetz, *Battered Husband Syndrome*, *supra* note 373, at 499–501 (reviewing predominance of such portrayal of men in comic strips)—as weak, vulnerable, dependent, and incompetent)? One such tangible effect that has received recent attention, for example, is the way that gender stereotypes contribute to the marginalization of men’s relational needs in child custody and support arrangements. For example, one study found that

[f]or previously involved and attached fathers, the negative consequences of divorce were paramount; of the multiple losses encountered, the most salient was the loss of their children and the pre-divorce father-child relationship. . . . [T]he great majority of non-custodial fathers considered traditional legal access arrangements to be grossly inadequate and damaging to the father-child relationship, and wanted their children to live with them, at least part of the time.

Edward Kruk, *Discontinuity Between Pre- and Post-Divorce Father-Child Relationships: New Evidence Regarding Paternal Disengagement*, 16 J. DIVORCE & REMARRIAGE 195, 215–24 (1991). Furthermore, although a large volume of research has examined the adverse impact of divorce on mothers’ physical and psychological health, relatively few studies have explored the consequences for fathers. Recent research indicates that the higher rates of mental illness, suicide, accidental death, and health-compromising behaviors such as alcohol consumption for divorced men than for their married counterparts may in large part be attributable to higher levels of strain associated with their postdivorce parental role (even if they have infrequent contact with their children). Among the factors that may contribute to the strain are unsatisfactory visitation and child support arrangements, distressing relationships with their ex-wives, and confusion about personal and social identity. Debra Umberson & Christine L. Williams, *Divorced Fathers: Parental Role Strain and Psychological Distress*, 14 J. FAM. ISSUES 378, 397–98 (1993). Thus, the popular tendency to indulge in “a simple, one-sided blaming of men” overlooks the complex forces at work, including (a) “our society’s inadequate sex role prescription for both men and women” (in which children are seen as “belong[ing] more to their mothers than to their fathers, even though there is no empirical evidence that women are better suited to child rearing than men”) and (b) “continuing conflict with the children’s mothers.” It appears that boys suffer the most from their father’s absence, perhaps setting the stage for possible relational dysfunction in later life. Edward Teyber & Charles D. Hoffman, *Missing Fathers*, PSYCHOL. TODAY, Apr. 1987, at 36–39. The needs of teenage fathers also are neglected when they are cast in the role of the villain, as society focuses on blame rather than help. See, e.g., Sara Parker, *You & Your Family, When a Father is Still A Child*, DAILY TELEGRAPH, Mar. 12, 1993, at 12. Another example is the much-overlooked impact of abortion on men. See generally ARTHUR B. SHOSTAK & GARY McLOUTH, *MEN AND ABORTION: LESSONS, LOSSES, AND LOVE* 13 (1984):

We were struck during our own abortion experiences by certain stark and regrettable features of the scene—the absence of any helpful preparation for the experience; the embarrassment and sense of uselessness men felt during their clinic vigil; the wish to talk about it versus the social pressure to tell no one; and the need to appear supportive regardless of one’s own ambivalence and heartache.

of consumption—violence and consumption—attitude harm similarly may miss most of the dreary reality of pornography's actual consumption. If one must resort to stereotype, it seems no less plausible to assume that most problematic consumption of pornography involves men who are more lonely and withdrawn than dangerous. In other words, the MacKinnon–Dworkin project's stereotypically horrific image of male sexuality may have inverted the causal sequence: Perhaps actual encounters with women affect some men's pornography consumption more than that consumption shapes those encounters. A more open-minded approach to the phenomenon of porn consumption, and one less driven by group-based political advocacy, might ask why (given the immediately foregoing hypothesis) pornography's consumers apparently prefer such a depersonalized form of sexuality. Do they perhaps find it a safer alternative to the real thing? If so, then one interested in understanding the phenomenon (rather than in passing authoritarian judgment) might explore the reasons that some persons find actual interpersonal sexual experience so threatening as to take refuge in a more manageable but perhaps less rewarding alternative.

In a larger sense, preoccupation with sexual difference in the distribution of values and behaviors can preempt consideration of the values and behaviors themselves.

It is necessary for us to remember, as we think critically about domination, that we all have the capacity to act in ways that oppress, dominate, wound (whether or not that power is institutionalized). . . . [I]t is first the potential oppressor within that we must resist—the potential victim within that we must rescue—otherwise we cannot hope for an end to domination, for liberation.<sup>386</sup>

## V. Conclusion

The fortunate inhabitants of free societies are prone to underestimate the rigor and completeness of control within totalitarian ones. They often assume the universality of their own liberties, and lack first hand knowledge of totalitarian regimentation. . . . They fail to understand the integral nature of totalitarian society, and consider it possible to incorporate certain desirable features of such systems without concomitant personal regimentation or increased temptation to shore them up by further features of less honorable character. Or others among them may admit extension of control, but justify it by arguing that such losses of liberty are transitory, and more than offset by achieving higher and more meaningful freedom.<sup>387</sup>

Authoritarianism is as censorship does. It appeals to fear, thrives on ignorance, and provokes hostility. It would make the world a grim and humorless place.<sup>388</sup> And it

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<sup>386</sup>Bell Hooks, *Feminism: A Transformational Politic*, in THEORETICAL PERSPECTIVES, *supra* note 205, at 185, 186–87. Hooks recognized that Whites, Blacks, men, and women all oppress and are oppressed; but she also believed that “[f]eminism as liberation struggle must exist apart from and as a part of the larger struggle to eradicate domination in all its forms. We must understand that patriarchal domination shares an ideological foundation with racism and other forms of group oppression, that there is no hope that it can be eradicated while these systems remain intact.” *Id.* at 188. For studies of the incidence of violence and abuse by women, see *supra* note 373–83.

<sup>387</sup>METZ & THOMSON, *supra* note 54, at 2.

<sup>388</sup>A good sense of humor—which is “a universally accepted indicator of positive mental health, with the sine qua non of emotional adjustment being the ability to laugh at oneself”—as well as a sense of happiness are inversely related to dogmatism. Paul Dixon et al., *Relating Social Interest and Dogmatism to Happiness and Sense of Humor*, 42 INDIVIDUAL PSYCHOL.: J. ADLERIAN THEORY, RES. & PRAC. 421 (1986).

often offers these blessings in the alluring guise of righteous indignation at, and a promise to eradicate, the evil that (some) men do. It reassures us that if only we stamp out this threat, burn that book or movie, punish those people, everything will be all right. Authoritarianism, no less than an orgasm, is tough to argue with. Experience teaches that the authoritarian genie of censorship, once released, is difficult to control or to stuff back into the bottle.<sup>389</sup>

Like pornography, authoritarianism has the potential to bring out the worst in people, if for no other reason than that it offers the seductive illusion of gratification. The sexual experience that porn promises is counterfeit and ultimately unsatisfying; the power, safety, and reassurance that authoritarianism proffers actually weakens and subjugates all within its reach. Unlike pornography, however, authoritarianism inflicts its damage wrapped in the mantle of social preservation. Also, unlike pornography, there is no uncertainty about its coercive effect.

Folklorist Robert Cochran's research into political humor in Romania under Ceausescu's totalitarian regime provides an appropriate coda to an article intent on exposing the irony of authoritarianism dressed as egalitarianism. One of Cochran's favorite jokes, once understood, illustrates the point:

Question: "Why are there no pornographic magazines in Romania?" Answer: "Because the first page would be too terrible."<sup>390</sup>

This subversive riddle turned on two key aspects of Romanian life under Ceausescu's rule:

It depended first of all upon the ubiquitous presence of Ceausescu on the "first page" of virtually everything published in Romania. . . . In the world of naked bodies, as in the world of chemistry and children's songs, he could appear only as top banana. . . . His naked body, displayed as an image of virility, would indeed be "too terrible to contemplate."<sup>391</sup>

The riddle's real punch, however, came in the second *entendre*:

The joke also lampooned ostentatious official concern over pornography. . . . Such obsessive concern with pornography was mocked by the real joke. We don't need pornography, said the covert message. The real obscenity is running the country. What are mere pictures of genitals, it asked, compared to the routine actions of the man on the "first page"? The joke's deepest irony was here: to see this man naked, that is truly, would be "too terrible." He richly deserved it, for he was surely the unchallenged champion of Romanian pornography. It was too terrible, but it was true.<sup>392</sup>

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<sup>389</sup>See *supra* note 334.

<sup>390</sup>Robert Cochran, *Laughters Low: Political Jokes and the Heart of Romanian Life* 11 (Mar. 27, 1991) (unpublished text of lecture delivered in Hartman Hotz Lectures in Law & Liberal Arts at Univ. of Arkansas, on File with the author) [hereinafter "Laughters Low"]. For a more complete account of Cochran's research into Romanian political humor, see Robert Cochran, "What Courage!": Romanian "Our Leader" Jokes, 102 J. OF AMER. FOLKLORE 259 (1989).

<sup>391</sup>Laughters low, *supra* note 390, at 12.

<sup>392</sup>*Id.* at 12-13.